

① 89-1061

DEC 29 1989

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH
AND JOHN R. MARIK,

Petitioners,

v.

GENERAL CONFERENCE CORPORATION
OF SEVENTH-DAY ADVENTISTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the trademark and service mark "Seventh-day Adventist" invalid and void?
2. Were certain indispensable parties not joined to the cause of action?
3. Should Court of Appeals have imposed sanctions against Respondent?
4. Was Contempt Order of District Court properly before Court of Appeals for decision, and was such order void?
5. Did Contempt Order of District Court result in the imposition of excessive fines and the infliction of cruel and unusual punishments?
6. Did Judgment of District Court result in the deprivation of property without due process of law?



TABLE OF CONTENTS

| | |
|--|-----|
| Questions Presented | i |
| Table of Contents | iii |
| Table of Authorities | v |
| 1. Opinions Below | 1 |
| 2. Jurisdiction | 2 |
| 3. Constitutional and Statutory Provisions Involved | 2 |
| 4. Statement of the Case | 2 |
| 4.1 Nature of Case | 2 |
| 4.2 Proceedings and Disposition in District Court and Court of Appeals | 3 |
| 4.3 Statement of Facts | 4 |
| 5. Reasons for Granting the Writ | 9 |
| 6. Argument | 9 |
| 6.1 The Court Below Has Erred in Not Holding the Trademark and Service Mark "Seventh-day Adventist" Invalid and Void | 9 |
| 6.1.1 Judicial Notice | 9 |
| 6.1.2 Genericness | 11 |
| 6.1.3 Freedom of Religion and Speech | 13 |
| 6.1.4 Establishment of Religion | 14 |
| 6.1.5 Ownership of Trademark and Service Mark | 15 |
| 6.2 The Court Below Erred in Not Holding Certain Entities to be Parties Which Were Indispensable to Cause of Action | 18 |
| 6.3 The Court Below Erred in Not Imposing Sanctions Against Respondent | 19 |
| 6.4 The Court Below Erred in Not Holding That the Contempt Order of the District Court was Before the Court for Decision, and that Such Order was Void and of no Force and Effect, and Ordering a Recision of the Warrant for Arrest of John R. Marik | 20 |

| | |
|--|-----------|
| 6.5 The Court Below Erred in not Holding That the Contempt Order Resulted in the Imposition of Excessive Fines and Infliction of Cruel and Unusual Punishment | 22 |
| 6.6 The Court Below Erred in not Holding That There had Been a Deprivation of Property Without Due Process of Law | 22 |
| 7. Conclusion | 23 |
| Certificate of Service | 24 |
| Appendices | App. 1-42 |
| Appendix A - Opinion of the United States Court of Appeals for the Ninth Circuit in General Conference Corporation of Seventh-day Adventists v. Seventh-day Adventist Congregational Church and John R. Marik, C.A. 88-2506, not yet reported, entered on October 5, 1989. | App. 1 |
| Appendix B - Opinion of the United States District Court for the District of Hawaii, in General Conference Corporation of Seventh-day Adventists v. Seventh-day Adventist Congregational Church and John R. Marik, C.A. 87-0274, not yet reported, entered on December 8, 1987. | App. 9 |
| Appendix C - Statutes Involved | App. 13 |
| Appendix D - Federal Regulations and Rules | App. 18 |
| Appendix E - Treatises | App. 20 |
| Appendix F - Encyclopedias and Dictionaries | App. 24 |
| Appendix G - Histories and Bibles | App. 33 |
| Appendix H - Denominational Books | App. 36 |
| Appendix I - Trademark Policy | App. 39 |
| Appendix J - News Items | App. 42 |

TABLE OF AUTHORITIES

1. Cases

| | |
|---|----|
| Alden v. St. Peter, 158 Ill 631 (Ill. Sup. Ct., 1895) | 10 |
| Bethel School District No. 403 v. Fraser, 106 S.Ct 3159 (1986) | 15 |
| Board of Provincial Elders of the Moravian Church v. Jones, 273 N.C. 174 (1968) | 13 |
| Brayshaw v. Ridout, 79 Md 454 | 10 |
| Brown v. Piper, 91 U.S. 37 (1875) | 9 |
| Brown Chem. Co. v. Meyher, 139 U.S. 540 (1891) | 13 |
| Cantwell v. Connecticut, 310 U.S. 296 (1940) | 14 |
| Carbon Fuel Co. v. United Mine Workers of Amer., 517 F.2d 1348 (C.A. 4, 1975) | 21 |
| Christensen Engineering Co. v. Westinghouse A.B. Co., 129 F. 96 (C.A. 2, 1904) | 21 |
| Christian Science Bd of Directors v. Evans et al, 105 N.J. 297 (1987) | 12 |
| City of Houston v. Hill, 482 U.S. 451 (1987) | 23 |
| Clay v. Waters, 178 F. 385 (C.A. 8, 1910) | 21 |
| Cromglass Corp. v. Ferm, 500 F.2d 601 (C.A. 3) | 21 |

| | |
|--|----|
| Daytona Power & L. Co v. Ohio Public Utilities Com., 292 U.S. 290 (1934) | 10 |
| Drummond Co. v. District 20, United Mine Wkrs., 598 F.2d 381 (C.A. 5, 1979) | 21 |
| Duell v. Duell, 178 F.2d 683 (C.A. D.C., 1949) | 21 |
| Edwards v. Aguillard, 107 S.Ct 2573 (1987) | 14 |
| Flat Slab Patents Co. v. Turner, 285 F. 257 (C.A. 8, 1922) | 21 |
| Fox v. Capital Co., 299 U.S. (1936) | 21 |
| Fox v. Kane Miller Corp., 398 F.Supp 609 (D.C. Md., 1975) | 10 |
| Girl Scouts of United States v. Personality Posters Mfg. Co., 304 F.Supp 1228 (SDNY, 1969) | 13 |
| Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U.S. 593 (1888) | 11 |
| Halderman v. Pennhurst State School & Hospital, 673 F.2d 628 (C.A. 3, 1982) | 21 |
| Hayes v. Fischer, 102 U.S. 121 (1880) | 21 |
| Hilton v. Atlantic Refining Company, 327 F.2d 217 (C.A. 5, 1964) | 19 |
| Hilton v. Roylance, 25 Utah 129 (Utah Sup. Ct., 1902) | 10 |
| Hodgson v. Mahoney, 460 F.2d 326 (C.A. 1, 1972) | 21 |

| | |
|---|----|
| Holzapfel's Compositions Co. v. Rahtjen's American Composition Co., 183 U.S. 1 (1901) | 11 |
| Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U.S. 118 (1905) | 13 |
| Hultberg v. Anderson, 214 F. 349 (C.A. 7, 1913) | 21 |
| Hyde Construction Company v. Koehring Company, 348 F.2d 643 (C.A. 10, 1965) | 21 |
| In Re Wella A.G., 787 F.2d 1549 (Fed.Cir., 1986) | 17 |
| In Re Wella A.G., 5 USPQ2d 1359 (1987) | 17 |
| In Re Wella A.G., 858 F.2d 725 (Fed. Cir., 1988) | 17 |
| K. Mart Corp. v. Cartier, Inc., 108 S.Ct 1811 (1988) | 16 |
| Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938) | 12 |
| Lemon v. Kurtzman, 403 U.S. 602 (1971) | 14 |
| Marsh v. State of Alabama, 326 U.S. 501 (1946) | 14 |
| Massachusetts v. Westcott, 431 U.S. 322 (1977) | 10 |
| Mc Daniel v. Mirza Ahmad Sohab, 27 N.Y.S.2d 525 (N.Y. S.Ct., 1941) | 13 |
| New Thought Church v. Chapin, 144 N.Y.S. 1026 (1913) | 13 |
| Peabody Coal Co. v. Local U. Nos. 1734, 1508 & 1548, U.M.W., 484 F.2d 78 (C.A. 6, 1973) | 21 |

| | |
|---|----|
| Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) | 19 |
| Re Manufacturers Trading Corp., 194 F.2d 948 (C.A. 6, 1952) | 21 |
| Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 39 Cal.2d 121 (1952) | 13 |
| Smith v. Pedigo, 145 Ind. 361 (Ind. Sup.Ct., 1893) | 10 |
| Smith v. Pro Football, Inc., 593 F.2d 1173 (C.A. D.C., 1978) | 10 |
| Smith v. Tobacco By-Products & Chemicals Corp., 243 F.2d 188 (1957) | 17 |
| Southern Railway Company v. Lanham, 403 F.2d 119 (C.A. 5, 1968) | 21 |
| Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias, 113 Mich. 133 (1897) | 13 |
| Thomas v. Board of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043 (C.A. 2, 1979) | 13 |
| Thomassen v. U.S., 835 F.2d 727 (C.A. 9, 1987) | 21 |
| Union of Prof. Airmen v. Alaska Aeronautical, 625 F.2d 881 (C.A. 9, 1980) | 21 |
| United States v. Dolan, 544 F.2d 1219 (C.A. 4, 1976) | 10 |
| United States v. Johnson, 801 F.2d 597 (C.A. 2, 1986) | 21 |
| United States v. Kahane, 396 F.Supp 687 (ED NY, 1975) | 10 |
| United States v. Lamont, 236 F.2d 312 (C.A. 2, 1956) | 10 |

| | |
|---|-------------------|
| United States v. Pink, 315 U.S. 203 (1942) | 10 |
| Werk v. Parker, 249 U.S. 130 (1919) | 10 |
| 2. <u>Constitution and Statutes</u> | |
| U.S. Constitution | |
| 1st Amendment | 2, 13, 14 |
| 5th Amendment | 2, 21, 23 |
| 8th Amendment | 2, 21, 22 |
| 14th Amendment | 2, 13, 14, 21, 23 |
| 15 U.S.C. Sec. 1051 | 17 |
| 15 U.S.C.-Sec. 1051-1127 | 2, 3, 12 |
| 15 U.S.C. Sec. 1121 | 3 |
| 15 U.S.C. Sec. 1127 | 8, 15, 16, 20 |
| 28 U.S.C. Sec. 1254(l) | 2 |
| 28 U.S.C. Sec. 1291 | 3 |
| 28 U.S.C. Sec. 1331 | 3 |
| 28 U.S.C. Sec. 1338(a), (b) | 3 |
| Hawaii Rev. Stat., Title 26, Sec. 480-2, 481-3, & 482-4 | 2, 3 |
| 3. <u>Miscellaneous</u> | |
| 3.1 <u>Federal Regulations and Rules</u> | |
| Code of Federal Regulations | |
| 37 C.F.R. 2.33 (1985) | 17 |
| - 37 C.F.R. Sec. 2.38 | 18 |
| Federal Rules of Civil Procedure | |
| FRCP 19 | 19 |
| Federal Rules of Evidence, | |
| Rule 201(d) | 9 |
| Rule 201(f) | 10 |
| PTO Trademark Manual of Examining Procedure, | |
| Sec. 1201.02(b) | 15 |

| | |
|--|--------|
| Sec. 1201.01 et seq | 17 |
| 3.2 Treatises | |
| <u>American Jurisprudence</u> | |
| 29 Am.Jur.2d, Evidence, Sec. 14-78 | 10 |
| <u>American Law Reports</u> | |
| 37 A.L.R.3d 277, "Charities, Churches - Name Protection" | 13 |
| 33 A.L.R.3d 448, "Appealability of Contempt Adjudication or Conviction," Sec. 23 | 21 |
| <u>Federal Procedure, Vol. 12, Law. Ed.,</u> | |
| Sec. 33.37-33.64 | 10 |
| <u>Mc Cormick on Evidence, 3rd ed, Law. ed.,</u> | |
| Chap. 35, "Judicial Notice" | 10 |
| <u>Moore's Federal Practice,</u> | |
| Vol. 10, Sec. 201.40 (d) | 10 |
| Vol. 9, Sec. 110.13 [4] | 21 |
| <u>Trademark Law and Procedure, E. Vandenburg (2d ed., 1968)</u> | |
| Sec. 10.11(b) | 17 |
| <u>Trademarks and Unfair Competition, 2nd ed, J. Thomas Mc Carthy,</u> | |
| Chap. 12, "Generic Terms" | 11 |
| p. 748, 839 | 16, 17 |
| Sec. 18.14, p. 830 | 17 |
| Sec. 16:14, 19:14 | 17 |
| 3.3 Encyclopedias and Dictionaries | |
| <u>A New Dictionary on Historical Principles, Henry Bradley, 1914 ed</u> | |
| | 11 |
| <u>New Werner Twentieth Century Edition of Encyclopedia Britannica, Vol. 25, 1905 ed., p. 52</u> | |
| | 6 |
| <u>Seventh-day Adventist Encyclopedia, 1966 ed</u> | |
| | 4, 7 |
| <u>The Encyclopedia Americana, Vol. 24, 1972 ed., p. 620</u> | |
| | 11 |

| | |
|---|--------|
| <u>The Encyclopedia of American Religions</u> , 2nd ed., 1987, J. Gordon Melton, p. 431, 432, 436, 444, 456 | 6 |
| p. 432-436 | 7 |
| p. 77-85, 432, 436 | 11 |
| p. 432-435 | 14, 18 |

The Westminster Dictionary of Church History, Jerald C.

| | |
|-------------------|----|
| Brauer, 1971 ed., | |
| p. 764 | 7 |
| p. 763, 764 | 11 |

Universal Dictionary of the English Language, Robert

| | |
|--|----|
| Hunter and Charles Morris, 1897 ed | 11 |
|--|----|

Webster's New International Dictionary, Third Ed., 1958,

| | |
|-------------|----|
| p. 38 | 11 |
|-------------|----|

| | |
|--|---|
| <u>The World Book Encyclopedia</u> , Vol. 17, 1989 ed., p. 326 | 7 |
|--|---|

3.4 Histories and Bibles

A History of Churches in the United States and Canada.

| | |
|----------------------------|----|
| Robert T. Handy, 1977 ed., | |
| p. 195-196 | 6 |
| p. 194-195, 294, 374 | 11 |

Bible.

| | |
|---------------------------|---|
| Exodus 20:8-11 | 4 |
| James 2:10 | 4 |
| John 14:3 | 4 |
| Revelation 14:12 | 4 |
| Revelation 14:9, 10 | 5 |
| Revelation 16:2 | 5 |

3.5 Denominational Books

Early Writings, E.G. White,

| | |
|-----------------------|-------|
| Prologue, p. xx | 5, 11 |
|-----------------------|-------|

| | |
|---|---|
| <u>Seventh-day Adventist Church Manual</u> , 1986 ed, p. 38 | 5 |
|---|---|

| | |
|---|---|
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| p. 241, 495 | 8 |

| | |
|---|--------|
| <u>Seventh-day Adventism Renounced</u> , D.M. Canright, 1889 ed, p. 25 | 11, 12 |
| 3.6 Newspapers | |
| <u>Houston Chronicle</u> , Sunday, September 24, 1989, p. 21A | 22 |

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PETITION FOR WRIT OF CERTIORARI
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Petitioners, Seventh-day Adventist Congregational Church and John R. Marik, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. OPINIONS BELOW

The opinion of the Court of Appeals, General Conference Corporation of Seventh-day Adventists v. Seventh-day Adventist Congregational Church and John R. Marik, No. 88-2506, is not yet reported. (App. A). The opinion of the Hawaii District Court, No. 87-0274, is not yet reported. (App. B).

2. JURISDICTION

The decision below issued on October 5, 1989. The jurisdiction of this Court is claimed under 28 U.S.C. Section 1254(1).

3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves listed provisions of the United States Constitution which provide in relevant part:

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . ."

Fifth Amendment

"[N]or be be deprived of life, liberty, or property, without due process of law; . . ."

Eighth Amendment

"[N]or excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The case also involves the following statutory provisions, the relevant part of the texts thereof being set forth in Appendix C: 15 U.S.C. Sec. 1051-1127, Hawaii Revised Statutes, Title 26, Sec. 480-2, 481-3, and 482-4.

4. STATEMENT OF THE CASE

4.1 Nature of the Case

This is an action for injunctive and declaratory relief arising under the laws of the United States and the laws of the State of Hawaii. Laws of the United States relevant are those relating to trademarks, servicemarks, false designation of origin and unfair competition, 15

U.S.C. Sec. 1051-1127 (known as the Lanham Act). Pertinent laws of the State of Hawaii are those relating to trademarks, servicemarks, tradenames, unfair competition, deceptive trade practices and false advertising, Title 26, Hawaii Revised Statutes, Sec. 480-2, 481-3 and 482-4. The Lanham Act, 15 U.S.C. Sec. 1051 et seq, particularly 15 U.S.C. Sec. 1121, and 28 U.S.C. Sec. 1331 and 1338(a), is the basis for the District Court's jurisdiction of the federal law claims for relief. Pendent jurisdiction of the District Court for claims under the laws of the State of Hawaii is pursuant to 28 U.S.C. Sec. 1338 (b). The basis for jurisdiction in the Court of Appeals is 15 U.S.C. Sec. 1121 and 28 U.S.C. Sec. 1291.

4.2 Proceedings and Disposition in District Court and Court of Appeals

The Complaint was filed on April 9, 1987. An answer was filed on May 18, 1987. A Motion for Judgment on the Pleadings, or in the Alternative, Motion to Strike, of the Plaintiff was filed on July 15, 1987. Pursuant to such motion, a Judgment and Permanent Injunction was entered on December 8, 1987. A Motion to Set Aside the Judgment, along with related motions, was made on December 20, 1987. Such motion was denied by an order entered on March 16, 1988, and an appeal was made to the Circuit Court, notice of appeal being filed on April 7, 1988. Following appeal to the Circuit Court, the District Court entered an order on May 12, 1988, holding Defendants in contempt and assessing fines of \$500.00 per day, collectively and individually against Defendants, and ordering that a warrant be issued for the arrest of John R. Marik. The District Court also awarded plaintiff \$13,929.21 for attorneys' fees and costs in pursuing the contempt order. The Court of Appeals heard such appeal on May 11, 1989, and rendered an Opinion on October 5, 1989. Such Opinion reversed and remanded the case on the grounds that a Judgment on the pleadings is improper where a defendant either raises questions of material fact or presents affirmative defenses. It did not address the Order for contempt; it held that such order was not before the Court. It also denied that the "adjudicative facts" sought to be judicially noticed by the Court were in compliance with Federal Rule of Evidence 201. Further, it held: "Remaining points urged by defendants are without merit."

4.3 Statement of Facts

The Seventh-day Adventist Congregational Church, one of the Petitioners, is an independent congregational church in Hawaii, located on the island of Hawaii. Its pastor is John R. Marik, the other Petitioner. The worship services of the Seventh-day Adventist Congregational Church are conducted in a building on which is placed a sign reading: SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH. This sign is used solely in connection with the religious activities of the Seventh-day Adventist Congregational Church, its primary purpose being to designate the location of the place where worship services are conducted and to extend an invitation to others who desire to join in such worship services. Each word of such sign is intricately interwoven with the religious beliefs of Petitioners, particularly the words "Seventh day Adventist."

Due to the nature of this case, it is impossible to appreciate the significance of the name "Seventh-day Adventist" and the circumstances which have resulted in this cause of action without a proper understanding of certain basic doctrinal beliefs of the parties to this law suit and their departures in practice. Accordingly, these are presented. The making of such presentation is so that Court may make an enlightened decision, giving due accord to justice and equity, and upholding and setting a standard of highest judicial integrity.

The word "Seventh-day" is used in the church sign of Petitioners to denote the fact that they worship on the Sabbath, sunset on Friday to sunset on Saturday, as explicitly commanded by God in His Fourth Commandment, Bible, Exodus 20:8-11, and that they keep God's Ten Commandments because the breaking of any one of them is considered as breaking them all. Bible, James 2:10. The word "Adventist" in the church name expresses their religious belief that the Second Advent of Jesus Christ is imminent. It also expresses that they have the "faith of Jesus," for He has promised "I will come again . . ." Bible, Rev. 14:12; Jn. 14:3. But, the name "Seventh-day Adventist" has even deeper significance; this is emphasized in the Seventh-day Adventist Encyclopedia, 1966 ed., p. 1179, where it is stated: "the popular explanation that the name was selected as denoting one who believes in the Second Advent and observes the seventh day is an oversimplification." One primary doctrine that it

emphasizes is that those who reverently, with the faith of Jesus, keep the Sabbath as a day of worship, along with the other Commandments, will bear the mark of God. In contrast to them, will be those that keep Sunday as a day of worship, violating the Commandments, and who will thus bear the "mark of the beast" and suffer severely when the "wrath of God" is poured out upon the earth unmixed with mercy. Bible, Rev. 14:9,10; 16:2.

The Respondent, General Conference Corporation of Seventh-day Adventists, is wholly owned, directly or indirectly, by the Seventh-day Adventist Church, whose governing body is the General Conference of Seventh-day Adventists, a non-incorporated legal entity. Many of the officers of the General Conference of Seventh-day Adventists are also officers of the General Conference Corporation of Seventh-day Adventists. The religious beliefs of the Seventh-day Adventist Church and its members acting as officers of the General Conference Corporation of Seventh-day Adventists, and those of the Seventh-day Adventist Congregational Church are almost identical. The main point of difference is that the Seventh-day Adventist Church now considers itself a hierarchical church, in practice, though it denominates itself as being "Representative," Seventh-day Adventist Church Manual, 1986 ed., p. 38, whereas the Seventh-day Adventist Congregational Church is a congregational church, as its name clearly indicates. Petitioners are not opposed to organization per se, but they are opposed to church organizations of a hierarchical type for they tend to place reliance on man instead of God. Certain television evangelists such as Jimmy Swaggart and Jim Bakker prove the pitfall. In various law suits the Seventh-day Adventist Church has alleged that it is a hierarchical organization.

The name "Seventh-day Adventist" was used to indicate those of a particular religious belief as early as 1844. In Early Writings, by Ellen G. White, a Seventh-day Adventist publication, it is stated in the prologue, p. xx: "Into their midst came a Seventh-day Baptist, Rachel Oakes, who distributed tracts setting forth the binding claims of the fourth commandment. Some in 1844 saw and accepted this Bible truth. One of their number, William Farnsworth, in a Sunday morning service, stood to his feet and declared that he intended to keep God's Sabbath of the fourth commandment. A dozen other joined him, taking their stand firmly on all of God's commandments. They were the first Seventh-day Adventists." (emphasis added). This

is verified from other sources, e.g. the New Werner Twentieth Century Edition of Encyclopedia Britannica, Vol. 25, 1905 ed., states at page 52: "ADVENTISTS. The general name of Adventists is applied to a group of six more or less cognate sects of the Christian church, originating and existing chiefly in the United States and Canada. . . . There are now six major divisions of the Adventist church, as follows: 1.- Evangelical Adventists. . . . 2.- Seventh Day Adventists. These formed a separate body in 1845. They observe the seventh day, Saturday, as the Sabbath, and believe in the present day gift of prophecy and the annihilation of the unsaved. 3.- Churches of God, or Age-to-Come Adventists. . . . 4.- Advent Christians. . . . 5.- The Church of God. . . . 6.- The Life and Advent Union." In The Encyclopedia of American Religions, 2nd ed., 1987, the "The Adventist Family" of Christianity, is divided into (1) "Sunday Adventists," (2) "Seventh-day Adventists," (3) "Church of God Adventists," (4) "Jehovah's Witness Groups," and (5) "Southcottites." Ibid. p. 431, 432, 436, 444, 456. "An Adventist general conference was held in Albany in 1845, but the movement, torn by controversy, proliferated into a number of bodies, such as the Advent Christian Church and the Church of God (Adventist). One stream of the movement adopted the Seventh-day (Saturday) observance of the Sabbath and eventually became known as the Seventh-day Adventist Church." A History of Churches in the United States and Canada, Robert T. Handy, 1977 ed., p. 195-196. "Seventh-Day Adventism originated about fifty years ago in the work of Mr. Miller, who set the time for the end of the world in 1843-4. Adding some doctrines to the original faith, Elder James White and wife in 1846 became the leaders of the Seventh-Day branch of Adventism. Their headquarters were at different times at Paris, Me., Saratoga, Oswego, and Rochester, N.Y. In 1855 they settled permanently at Battle Creek, Mich., which has remained the center of the work ever since." "Seventh-Day Adventism Renounced," D.M. Canright, 1889 ed. The Respondent claims a derived first use of the name "Seventh-day Adventist" as of 1860. At that time there were a number of congregational churches holding to the religious beliefs of both the Petitioners and Respondent which bore the name Seventh-day Adventist Church, as already noted. On May 21, 1863, the General Conference of Seventh day Adventists was organized, which consolidated many of these churches and has resulted in the present

hierarchical Seventh-day Adventist Church. Seventh-day Adventist Encyclopedia, 1966 ed., p. 435; The Westminster Dictionary of Church History, Jerald C. Brauer, 1971 ed., p. 764; The World Book Encyclopedia, Vol. 17, 1989 ed., p. 326. The name "Seventh-day Adventist" has been used in names of a number of other churches, i.e. Seventh-day Adventist Church, Reform Movement, and the Davidian Seventh-day Adventist Church. The Encyclopedia of American Religions, 2nd ed., J. Gordon Melton, 1987, p. 432-436. In fact, Respondent by its own admission acknowledges such fact for it asserts that on July 22, 1888, "Elder A.J. Cudney organized the nine charter members as the first S.D.A. Church in Hawaii." Respondent's Memorandum in Opposition to Petitioners' Motion to Set Aside and other motions, Exhibit 4, p. 1, Hawaii District Court, C.A. 87-0274 above referenced. That church was organized separate and apart from being a constituent member of the General Conference of Seventh-day Adventists, for the Hawaii Conference of Seventh-day Adventists was not even established until 1895. Seventh-day Adventist Yearbook 1988, p. 241.

The General Conference Corporation of Seventh-day Adventists, Respondent, secured a trademark and service mark of the name "Seventh-day Adventist," Registration No. 1,177,185, on November 10, 1981. On April 9, 1987, this suit was filed alleging, among other things, infringement of such trademark, and a copy of such trademark was attached as Exhibit B to the Complaint. The only fact shown in the Complaint to document the alleged trademark infringement and other claims made, was a picture of the church sign, "Seventh-day Adventist Congregational Church." No specific commercial activity of Petitioners of any kind was indicated. No reference was made to their buying, selling, exchanging, consigning, brokering, financing, manufacturing, fabricating, engineering, transporting, storing, handling, servicing, or dealing in any other manner with any specific commercial product or service in which the name "Seventh-day Adventist" was used.

Respondent had not registered as a corporation to do business in the State of Hawaii at any time prior to entering of Judgment. Activities of the Seventh-day Adventist Church are conducted in Hawaii through the Hawaii Conference of Seventh-day Adventists, a non incorporated legal entity, and various corporations, other than Respondent, such as the Castle Medical Center, a non-profit corpora-

tion, at Kailua, Hawaii. Seventh-day Adventist Yearbook 1988, p. 241, 495. Petitioners acted pro se in this case until after Judgment was rendered, John R. Marik acting individually for himself, and as an executive officer of the Seventh-day Adventist Congregational Church.

Pursuant to a hearing held on May 9, 1988, the District Court held that Petitioners were in contempt and fines assessed, and directed that a warrant for the arrest of John R. Marik be issued. An Order was so entered on May 12, 1988. Such Order remains unrescinded. A warrant for the arrest of John R. Marik has been outstanding for over nineteen months. On December 15, 1989, he was apprehended.

General Conference Corporation of Seventh-day Adventists has asserted in its Complaint and other documents filed in this case that it is the owner of the tradename, trademark, and servicemark "Seventh-day Adventist." It admits that "The General Conference Corporation of Seventh-day Adventists is a wholly owned, controlled and subordinate entity of the General Conference of Seventh day Adventists." (emphasis added) Last sentence of Page 3, Respondent's Memorandum in Opposition to Petitioners' Motion for Sanctions, C.A. Case No. 88-2506, above cited. On or about November 1, 1988, the North American Division of Seventh-day Adventists adopted a new policy relating to trademarks, NAD B 80, a copy of which was attached to Petitioners' Motion for Court to Take Judicial Notice of Assignment of Trademark, C.A. Case No. 88-2506, above cited, and is also set forth in the Appendix D hereof. In Section B 80 20 thereof it is provided: "It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that should be taken to protect the proprietary interests of the Church as well as its good name. Approval of the General Conference Officers shall be obtained prior to the implementation of any legal action." The Trademark Committee is a committee of the General Conference of Seventh-day Adventists, not of the General Conference Corporation of Seventh-day Adventists. Such corporation admits that the General Conference of Seventh day Adventists is "a 'related company' within the meaning of 15 U.S.C. Sec. 1127 and its use of the trademark/service mark 'Seventh-day Adventist.'" Sec. 5 of Affidavit attached to Respondent's Memorandum in

Opposition to Petitioners' Motion for Sanctions." Case No. 88-2506, cited above.

Petitioners continue to use their church sign reading "Seventh-day Adventist Congregational Church."

5. REASONS FOR GRANTING THE WRIT

5.1 The decision below which is neither constitutionally nor logically compelled, conflicts with the tenor of decisions of this and other lower federal courts concerning matters which may be judicially noticed, which are in violation of Constitutional rights of freedom of religion and speech, which constitute excessive fines imposed and cruel and unusual punishments inflicted, which amount to deprivation of property without due process of law, which require sanctions, and the jurisdiction of federal courts of appeal over orders ancillary to the judgment, such as a contempt order of a district court, and the scope of the relief which may be granted.

5.2 The decision below has so far deviated from the accepted and usual course of judicial proceedings, as noted above, and even been in conflict with its own decisions, as to call for an exercise of this Court's power of supervision in order that there be a symmetry in the law and not be an abuse of judicial discretion.

6. ARGUMENT

6.1 THE COURT BELOW HAS ERRED IN NOT HOLDING THE TRADEMARK AND SERVICE MARK "SEVENTH-ADVENTIST" INVALID AND VOID.

6.1.1 Judicial Notice

The Court of Appeals was specifically requested pursuant to the provisions of Rule 201(d) of the Federal Rules of Evidence (hereafter "FRE") to take judicial notice of adjudicative facts set forth in briefs and motions of Petitioners, and in particular as they were referenced in the Bible, Encyclopedias, Law Review articles, and other books and materials referenced in such documents, matters which may be readily verified. See *Brown v. Piper*, 91 U.S. 37, 42-43, 23 L.ed 200 (1875). "Adjudicative facts" were presented which are not subject to reasonable dispute, and therefore pursuant to FRE 201(d) it was

mandatory that the Court take judicial notice of them. *Brown v. Piper*, *Ibid.*, 10 Moore's Federal Practice, Sec. 201.40 (d).

FRE 201(f) specifies: "Judicial notice may be taken at any stage of the proceeding." It has been held that the rule of judicial notice applies to appellate courts, and they will generally take judicial notice of any matter which the court below could have judicially noticed. *United States v. Pink*, 315 U.S. 203, 86 L.Ed 796, 69 S.Ct 552 (1942); *Massachusetts v. Westcott*, 431 U.S. 322, 52 L.Ed.2d 349, 97 S.Ct 1755 (1977); *United States v. Dolan*, 544 F.2d 1219 (C.A. 4, 1976). For purposes of judicial notice, reference may be made to encyclopedias, textbooks, dictionaries, or other publications of established authenticity. *Werk v. Parker*, 249 U.S. 130, 63 L.Ed 514, 39 S.Ct 197 (1919); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (C.A. D.C., 1978). The pleadings in this case must be read in the light of the facts of which the Court takes judicial notice. *United States v. Lamont*, 236 F.2d 312 (C.A. 2, 1956). Judicial notice has been taken of economic and business matters in Federal courts. *Dayton Power & L. Co. v. Ohio Public Utilities Com.*, 292 U.S. 290, 78 L.Ed 1267, 54 S.Ct 647 (1934); *Fox v. Kane Miller Corp.*, 398 F.Supp 609 (D.C. Md, 1975). Judicial notice has been taken of religious matters. Particular attention is directed to the Trademark Policy set forth Append. I. The dietary requirements of orthodox Jews has been judicially noticed. *United States v. Kahane*, 396 F.Supp 687 (ED NY, 1975). Matters of religious history are matters deemed subject to judicial notice, whether general or relating to a particular denomination. *Smith v. Pedigo*, 145 Ind. 361, 393, 33 N.E. 777 (Ind. Sup.Ct., 1893); *Hilton v. Roylance*, 25 Utah 129, 69 P. 660 (Utah Sup. Ct., 1902). The general doctrines and rules of each religious sect, and the distinction in belief between any sects is a proper subject of judicial notice. *Hilton v. Roylance*, *Ibid*, *Smith v. Pedigo*, *Ibid*. Expulsion practices of particular denominations have been judicially noticed. *Brayshaw v. Ridout*, 79 Md 454, 29 A. 515. See 20 A.L.R.2d 514, Sec. 28. Judicial notice has also been taken of the existence of many incorporated church societies. *Alden v. St. Peter*, 158 Ill 631, 42 N.E. 392 (Ill. Sup.Ct., 1895). A general discussion of the matter of judicial notice in Federal Courts is given in 12 Federal Procedure, Lawyer's Edition, Sec. 33.37-33.64. See also 29 Am.Jur.2d Evidence Sec. 14-78, and Mc Cormick on Evidence, 3rd ed, Lawyer's Ed., Chap. 35, "Judicial Notice."

6.1.2 Genericness

Generic terms cannot be trademarked. *Holzapfel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U.S. 1, 46 L.ed 49, 22 S.Ct 6 (1901); *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 32 L.Ed 535, 9 S.Ct 166 (1888); Trademarks and Unfair Competition, 2nd. ed., J. Thomas Mc Carthy, Chap. 12, "Generic Terms," p. 519 et seq. Genericness may be evidenced by: (1) Generic use by competitor not contested by trademark registrant. (2) Generic use by trademark registrant. (3) Dictionary definitions. and (4) Generic use by trade journals, encyclopedias, and other media. Ibid. p. 528-529. It is particularly noted that Respondent has not contested the use of Seventh-day Adventist by the Seventh day Adventist Church, Reform Movement, which has numerous churches in the United States and in foreign countries. Neither have they contested the use of such name by the Davidian Seventh-day Adventists Association. See Transcript of Proceedings of Hearing on May 11, 1989, of United States Ninth Circuit Court of Appeals in this case, C.A. 88-2506, p. 33. The General Conference of Seventh-day Adventists, in a book published by them, from whom Respondent has a derived use, has used the name "Seventh day Adventist" in a generic sense as noted above in the prologue, p. xx, of Early Writings, E.G. White, where in referring to a church organized in 1844 it stated: "They were the first Seventh-day Adventists." Additionally, Respondent itself calls a church not a part of the General Conference of Seventh-day Adventists or Respondent, an "S.D.A.," or "Seventh-day Adventist" Church, namely the first "S.D.A." Church in Hawaii, as above noted. Dictionaries have used the name "Seventh day Adventist" in a generic sense. Universal Dictionary of the English Language, Robert Hunter and Charles Morris, 1897 ed.; A New Dictionary on Historical Principles, Henry Bradley, 1914 ed.; Webster's New International Dictionary, Third Ed., 1958, p. 38. The name "Seventh-day Adventist" has been used by the media in a generic sense. The Encyclopedia of American Religions, 2nd. ed., 1987, J. Gordon Melton, p. 77-85, 432, 436; The Encyclopedia Americana, Vol. 24, 1972 ed., p. 620; The Westminster Dictionary of Church History, Jerald C. Brauer, 1971, p. 763-764; A History of Churches in the United States and Canada, Robert T. Handy, 1977 ed., p. 194-195, 294, 374; Seventh-

Day Adventism Renounced, D.M. Canright, 1889 ed., p. 25-36. Thus, it is manifest, based on matters that may be judicially noticed, as above noted, that the name "Seventh-day Adventist" is generic.

The facts in this case are very similar to that of *Christian Science Bd of Directors v. Evans et al*, 105 N.J. 297, 520 A.2d 1347 (N.J. 1987). In the *Christian Science* case the religion had its origin in 1866. It became an organized religion in 1879. The defendants in that case disassociated themselves from the First Church of Christ, Scientist and formed their own church, using the name "Independent Christian Science Church of Plainfield, New Jersey." The First Church of Christ, Scientist obtained a trademark and service mark of the names "Christian Science" and "Church of Christ, Scientist" under the Lanham Trademark Act, 15 U.S.C. Sec. 1051-1127, and brought suit to enjoin continued use of such names by defendants. The Court in that case, 520 A.2d 1347, 1352, 1353, held that "'Christian Science Churches' is a generic name for churches in which Christian Science is practiced.", and "the term 'Christian Science Church' is not entitled to trademark status." It further held, *Ibid* p. 1354, that "Because we have concluded that 'Christian Science Church' is generic and not descriptive, any secondary meaning shown by plaintiffs is no avail to them." (emphasis added). Note the similarities of that case and this case: (1) both religions had their origin prior to their organization, (2) prior to the organization there were a number of such churches practicing such religion using a name which included that part thereof which was later trademarked and service marked, (3) the name of each was vitally associated with the religion, (4) plaintiff and defendants in each case practiced the same religion, (5) a trademark and service mark was in each case obtained under the Lanham Trademark Act, and (6) an injunction was sought in each case to prohibit further use of the name trademarked and service marked. The Court in the *Christian Science* case, *Ibid*, p. 1351, appropriately held: ". . . the law has come to recognize: (1) because 'Christian Science' is the name of a religion, anyone practicing . . . 'Christian Science' can use that phrase in the name of a church; (2) because defendants practice the Christian Science religion (as plaintiffs readily acknowledge), they are entitled to use 'Christian Science' in the name of their church." Generic names are not subject to trademark. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 83 L.Ed 73, 59 S.Ct 109 (1938).

6.1.3 Freedom of Religion and Speech

In *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 136, 71 N.W. 470, 471 (1897) a fundamental proposition was noted: "Nearly all our varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church to adopt as a permanent part of its name the name of the parent organization." This principle was acknowledged in *Mc Daniel v. Mirza Ahmad Sohab*, 27 N.Y.S.2d 525 (Sup.Ct.), aff'd 262 A.D. 838, 290 N.Y.S.2d 509 (1941) where the Court held as page 527: "The plaintiffs have no right to a monopoly of the name of a religion. The defendants, who purport to be members of the same religion, have an equal right to use the name of the religion in connection with their own meetings, lectures, classes and other activities. . . . Defendants have the absolute right to practice Baha'ism, to conduct meetings, collect funds and sell literature in connection therewith, and to conduct a book shop under the title 'Bahia Book Shop.'" A similar approach has been adopted in other cases: *New Thought Church v. Chapin*, 159 A.D. 723, 144 N.Y.S. 1026 (1913); *Board of Provincial Elders of the Moravian Church v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968); *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal.2d 121, 245 P.2d 481 (1952), cert den 345 U.S. 938, 97 L.Ed1365, 73 S.Ct 828 (1953). Each of the above cases clearly indicate that the name is closely tied with the religion and entitled to appropriation by a group holding the same religion. It is thus a fundamental right and constituent part of freedom of religion subject to protection under the First and Fourteenth Amendments of the U.S. Constitution. See *Charities, Churches - Name Protection*, 37 A.L.R.3d 277.

Petitioners are entitled to use a sign to announce their religious services as a part of their freedom of speech under the First and Fourteenth Amendments to the U.S. Constitution. *Girl Scouts of United States v. Personality Posters Mfg. Co.*, 304 F.Supp 1228 (SDNY, 1969). *Brown Chem. Co. v. Meyher*, 139 U.S. 540, 35 L.Ed. 247, 11 S.Ct 625 (1891); *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 49 L.Ed 972, 25 S.Ct 609 (1905); *Thomas v. Board of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (C.A. 2,

1979), cert den 444 U.S. 1081, 62 L.Ed 765, 100 S.Ct 1034. Where property rights are juxtaposed with the right of freedom of speech, the latter occupies the preferred position. *Marsh v. State of Alabama*, 326 U.S. 501, 90 L.Ed 265, 66 S.Ct 276 (1946).

6.1.4 Establishment of Religion

In *The Encyclopedia of American Religions*, 2nd Ed., J. Gordon Melton, 1987, p. 432-435, there are listed four churches bearing the name "Seventh-day Adventist" or "S.D.A." in their titles, other than the Seventh-day Adventist Church, which is also listed. One of these churches, Seventh-day Adventist, Reform Movement, had its origin in 1914 as a result of their members being disfellowshipped from the Seventh-day Adventist Church for refusing to bear arms in violation of the commandment "Thou shalt not kill." As already noted, the name "Seventh-day Adventist" is intimately connected with these religious groups. Consequently, to allow one of them to the exclusion of the others to use the name "Seventh-day Adventist" based on laws of the United States would be to advance that religion, and inhibit the others. This would be in violation of the Establishment Clause of the First Amendment of the United State Constitution which states: "Congress shall make no law respecting an establishment of religion. . ." Under the Fourteenth Amendment, this "fundamental Concept of liberty" is also applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L.Ed 1213, 60 S.Ct 900, 903 (1940). The Court in *Edwards v. Aguillard*, ___ U.S. ___, 96 L.Ed.2d 510, 107 S.Ct 2573 (1987) applied a three-pronged test for determining whether there was compliance with the Establishment Clause: "First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion." To contrive the Lanham Trademark Act so that Respondent is entitled to a a trademark of the name "Seventh-day Adventist," would most definitely advance one religion, and inhibit other religions. Thus, based on a non-compliance with the second prong of the three-pronged test, there would be a violation of religious liberty, contrary to the provisions of the First and Fourteenth Amendments of the United States Constitution. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct 2105 (1971). The special context out of which this

controversy arose must be given due consideration, particularly its historical context which may be judicially noticed. *Bethel School District No. 403 v. Fraser*, ___ U.S. ___, 92 L.Ed.2d 549, 106 S.Ct 3159 (1986).

6.1.5 Ownership of Trademark and Service Mark

Respondent has asserted in its Complaint and other documents in this case, C.A. No. 87 0274, that it is the owner of the tradename, trademark, and servicemark "Seventh-day Adventist." It admits that "The General Conference Corporation of Seventh-day Adventists is a wholly owned, controlled and subordinate entity of the General Conference of Seventh day Adventists," (emphasis added). Page 3, Respondent's Memorandum in Opposition to Petitioners' Motion for Sanctions, Case No. 88-2506, above cited. On or about November 1, 1988, the North American Division of Seventh-day Adventists adopted a new trademark policy, NAD B 80, a copy of which was attached to Petitioners' Motion for Court to Take Judicial Notice of Assignment of Trademark, Case No. 88-2506, above cited, and is also set forth in the Appendix I hereof. In Section B 80 20 thereof it is provided: "It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that should be taken to protect the proprietary interests of the Church as well as its good name. Approval of the General Conference Officers shall be obtained prior to the implementation of any legal action." The Trademark Committee is a committee of the General Conference of Seventh-day Adventists, not of Respondent, General Conference Corporation of Seventh-day Adventists. Such corporation admits that the General Conference of Seventh day Adventists, is a "related company" within the meaning of 15 U.S.C. Sec. 1127" and that such conference, not Respondent, supervises and controls the use of the trademark/service mark "Seventh-day Adventist" by the Pacific Union Conference of Seventh-day Adventists and the Hawaii Conference of Seventh-day Adventists. Sec. 5 of Affidavit attached to Respondent's Memorandum in Opposition to Petitioners' Motion for Sanctions." Case No. 88-2506, cited above. In PTO Trademark Manual of Examining Procedure, Sec. 1201.02(b) it is provided: "In a related company situation, the party who controls the nature and

quality of the goods or services with which the mark is used and who is thereby the owner of the mark, should be set out in the application as the applicant." Here is a clear statement that the one who controls the nature and quality of the goods with which the mark is used, is the owner of the mark, regardless of who may hold legal title, and is the appropriate one to make application for the trademark and service mark. In this regard the following should be noted: (1) the Trademark Policy NAB 80 places legal title in Respondent, Sec. B 80 10 and B 80 30 of policy, in a similar manner as would a deed of trust place legal title in trustee, leaving the equitable title and possession and control in the trustor, (2) the General Conference of Seventh-day Adventists, through its Trademark Committee, monitors and reviews any unauthorized use of trademarks, Sec. B 80 20 of policy, (3) such committee makes recommendations to Respondent regarding any legal or other action that should be taken with regard to trademarks, service marks, or trade name, (4) no legal action shall be conducted by Respondent with regard to such matters without approval of such Trademark Committee, (5) Respondent admits that it is controlled by General Conference of Seventh day Adventists, (6) Respondent admits that the General Conference of Seventh-day Adventists is a "related company" within meaning of 15 U.S.C. Sec. 1127, and (7) Respondent neither directly nor indirectly controls the Pacific Union Conference of Seventh-day Adventists or Hawaii Conference of Seventh-day Adventists, and therefore they are not a "related company" within the meaning of 15 U.S.C. Sec. 1127, (8) Respondent, at the time judgment was entered in this case, had no operations in Hawaii, and was not even authorized to do business there, (9) prior to commencement of this action, initial correspondence with Petitioners regarding trademark infringement of the name "Seventh day Adventist" was initiated by a member of the Trademark Committee of the General Conference of Seventh-day Adventists, not Respondent, and (10) Justice Brennan, speaking for the majority of the Court on the point, observed that "the parent corporation - not the subsidiary whose every decision it controls - better fits the bill as the true owner of any property that the subsidiary nominally possesses." *K Mart Corp. v. Cartier, Inc.*, ___ U.S. ___, 100 L.ed.2d 313, 108 S.Ct 1811, 1821 (1988), citing *I J. Mc Carthy, Trademarks and Unfair Competition*, 748 (2d ed, 1984). Considering the matters above specified, the General Conference of Seventh-day Adventists and not

Respondent is the owner of any trademark and service mark of the name "Seventh-day Adventist," and should have made application for its registration, not Respondent. The comments in Trademarks and Unfair Competition, J. Thomas Mc Carthy 2nd. Ed., 1984, Sec. 18.16 at page 839 are appropriate: "The Lanham Act definition of 'related company' is awkwardly worded in that it contains the phrase 'any person who legitimately controls . . . the registrant'. This could be read to mean that licensees could control the licensor-registrant. But this would be an absurd reading, totally contrary to the whole rationale of licensing and the PTO does not so read the Act." Judge Nies, concurring in *In Re Wella A.G.*, 787 F.2d 1549 (Fed. Cir. 1986) states: "Regardless of their being related companies, only one is the owner. Whether the relationship is that of licensor/ licensee or parent/subsidiary, the one entity which controls the nature and quality of the goods sold under the mark is the owner. See J. Mc Carthy, *supra*, Sec. 18.14, p. 830; Trademark Manual of Examining Procedure, Sec. 1201.01 et seq." In this case, the Respondent, General Conference Corporation of Seventh-day Adventists, admits that it is the General Conference of Seventh-day Adventists who controls the nature and quality of the goods sold under the mark, as already noted. Accordingly, the General Conference of Seventh-day Adventists is the owner of the trademark and service mark "Seventh-day Adventist." Under Section 1 of the Lanham Act, 15 U.S.C. Sec.1051, it is only the owner of a mark who is entitled to apply for registration. In *In Re Wella A.G.*, *Ibid.*, it was stated in the concurring opinion of Judge Nies: "If one who is not the owner seeks registration, the application must be denied and any registration which issues is invalid." In support Judge Nies cited *Smith v. Tobacco By-Products & Chemical Corp.*, 243 F.2d 188, 44 CC Pa 880, 113 USPQ 339 (1957); J. Mc Carthy, *Trademarks and Unfair Competition* Sec. 16:14, 19:14 (2d ed. 1984); E. Vandenburg, *Trademark Law and Procedure* Sec. 10.11(b) (2d ed. 1968): 37 C.F.R. 2.33 (1985). In a subsequent appeal of this case after remand, following a decision in *In re Wella A.G.* 5 USPQ2d 1359 (1987), the opinion of Judge Nies was not disturbed. *In Re Wella*, 858 F.2d 725 (Fed. Cir. 1988). Thus, by the General Conference Corporation of Seventh-day Adventists' own admissions, the trademark and service mark of the name "Seventh-day Adventist" is invalid. Accordingly, there is a lack of subject matter jurisdiction, and Petitioners'

assertions in this case that there was fraud perpetrated in the presentation of an application for such trademark and service mark by Respondent are confirmed, for there was a knowing misrepresentation made, with the deliberate intent to deceive, for on numerous occasions such party has asserted that it is owner of such trademark. This is corroborated by Respondent's Application for the trademark and service mark of the name "Seventh-day Adventist," Append. E. It contains no mention of a first use by a predecessor in title, or by a related company, or to uses by others which inure to the benefit of applicant, as required by 37 C.F.R. Sec. 2.38. This also confirms Petitioners' assertion that the General Conference of Seventh-day Adventists was an indispensable party to this action. Further, it evidences that Respondent has come with "unclean hands," as contended, and in addition to not being entitled to relief, should have sanctions imposed against it.

6.2 THE COURT BELOW ERRED IN NOT HOLDING CERTAIN ENTITIES TO BE PARTIES WHICH WERE INDISPENSABLE TO CAUSE OF ACTION

The interrelation between Respondent and the General Conference of Seventh-day Adventists as evidenced by the Trademark Policy NAD B 80, above noted, make it indisputably manifest that the General Conference of Seventh-day Adventists is an indispensable party to this cause of action.

Respondent alleged in its Complaint, Sec. 9, that it has "a membership in excess of four and one-half million." The Encyclopedia of American Religions, Second Ed., J. Gordon Melton (1987) lists only one Seventh-day Adventist Church as having a membership of over four million members, and that is the General Conference of Seventh-day Adventists, a non-incorporated entity. The Hawaii Conference of Seventh-day Adventists, a non-incorporated entity, is a subordinate entity of such organization. In all pleadings prior to Judgment, and in the Judgment in this cause of action, the Respondent was shown in the style of the case as "GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS." In Section I of the Complaint the statement is made: "Plaintiff, General Conference Corporation of Seventh-day Adventists, is a corporation duly organized and existing under and by virtue of the laws of the District of Columbia with its principal place of business

at 6840 Eastern Avenue N.W., Washington, D.C., 20012." Nevertheless, Respondent tries to contend that the actions of the Hawaii Conference of Seventh-day Adventists and the General Conference of Seventh-day Adventists are the actions of the Respondent. See Sec. 8 of Complaint. Respondent is not even qualified to do business in the State of Hawaii, as noted above, nor is it qualified to do business "worldwide" in every country in which there is a Seventh-day Adventist Church. Respondents themselves recognize this deficiency in their pleadings, and even try to make a defacto correction by pseudo adding them. Note that in Memorandum in Opposition to Motion to Set Aside Judgment, C.A. 87 0274, above noted, the style of the case shows Respondent as "Plaintiffs" (note plural), and on p. 1 plaintiff is defined as "GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS," and on p. 2 plaintiff is defined as "General Conference of Seventh-day Adventist." Further, in Exhibits 4,5,6, & 7 of such memorandum, actions are shown of the Hawaii Conference of Seventh day Adventists, not of Respondent. In fact, all of page 1 such such Exhibit 4 relates to incidents occurring prior to the incorporation of Respondent. Further, Respondent, as noted before, is not qualified to do business in Hawaii. Neither can Respondent claim actions by the Hawaii Conference of Seventh day Adventists for its own benefit as a "related company" for such conference is not a "related company" as above noted.

Although FRCP 19 prescribes when a party is indispensable, there is no set formula for determining in every case whether an entity is an indispensable party or not. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 19 L.Ed.2d 936, 88 S.Ct 733, 11 FR Serv.2d 400 (1968). "An indispensable party is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights." *Hilton v. Atlantic Refining Company*, 327 F.2d 217 (C.A. 5, 1964). Certainly that is the situation here. Lacking indispensable parties, the cause of action must utterly fail.

6.3 THE COURT BELOW ERRED IN NOT IMPOSING SANCTIONS AGAINST RESPONDENT.

It has been previously mentioned that sanctions should have been imposed against Respondent for making an improper application for a trademark of the name "Seventh-day Adventist" because it was not

the owner of such name since it did not have requisite control.

Petitioners filed a Motion for Sanctions against Respondent for misrepresentations made by Respondent in Memorandum in Opposition to Petitioners' Motion for Court to Take Judicial Notice of Assignment of Trademark, C.A. 88-2506, above noted, reference to which is made. Respondent then filed a Memorandum in Opposition, and Petitioners filed Memorandum in Reply, reference to which is made. Such misrepresentations included (1) use of specifically defined term "General Conference" to refer to both Respondent and General Conference of Seventh-day Adventists, (2) indicating that the General Conference of Seventh-day Adventists is an incorporated entity, (3) indicating that ownership of name "Seventh-day Adventists" vested in Respondent in 1860, whereas Respondent was not incorporated until 1904, (4) indicating that there was a licensed use and not a joint use of the name "Seventh-day Adventists," (5) indicating that the Hawaii Conference of Seventh-day Adventists was a union conference and not a local conference, (6) indicating that the Hawaii Conference of Seventh-day Adventists was a "related company" within the meaning of 15 U.S.C. Section 1127, (7) indicating that provisions of Trademark Policy NAD B 80, above referenced, gave Respondent the legal right of ownership and enforcement of trademarks of the General Conference of Seventh-day Adventists, (8) indicating that a transfer of trademarks rights of name "Seventh-day Adventists" to Respondent occurred prior to filing of Complaint, (9) indicating the actions by North American Division of Seventh-day Adventists were those of Respondent, and (10) indicating the Trademark Policy B 80, above noted, formalized existing trademark policies and procedures. Such misrepresentations have been so numerous and so gross, that a clear intent is revealed to deceive both the Court and the Petitioners, and accordingly sanctions are warranted against Respondent. In failing to apply such sanctions, the Court below encourages improper judicial procedure, which can only lead to chaos.

6.4 THE COURT BELOW HAS ERRED IN NOT HOLDING THAT THE CONTEMPT ORDER OF THE DISTRICT COURT WAS BEFORE THE COURT FOR DECISION, AND THAT SUCH ORDER WAS VOID AND OF NO FORCE AND EFFECT, AND ORDERING A RECISION OF THE WARRANT

FOR ARREST OF JOHN R. MARIK.

The contempt order of the District Court was properly before the Court of Appeals. An order of civil contempt is reviewable on an appeal taken from the final judgment in the suit out of which the contempt proceedings arose. *Fox v. Capital Co.*, 299 U.S. 105, 81 L.Ed. 67, 57 S.Ct. 57 (1936); *Hayes v. Fischer*, 102 U.S. 121, 26 L.Ed. 95 (1880); *Duell v. Duell*, 178 F.2d 683 (C.A. D.C., 1949); *Hodgson v. Mahoney*, 460 F.2d 326 (C.A. 1, 1972); *United States v. Johnson*, 801 F.2d 597 (C.A. 2, 1986); *Christensen Engineering Co. v. Westinghouse A.B. Co.*, 129 F. 96 (C.A. 2, 1904); *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628 (C.A. 3, 1982); *Cromaglass Corp. v. Ferm*, 500 F.2d 601 (C.A. 3); *Carbon Fuel Co. v. United Mine Workers of Amer.*, 517 F.2d 1348 (C.A. 4, 1975); *Drummond Co. v. District 20, United Mine Wkrs.*, 598 F.2d 381 (C.A. 5, 1979); *Southern Railway Company v. Lanham*, 403 F.2d 119 (C.A. 5 [GA, now 11], 1968); *Peabody Coal Co. v. Local U. Nos. 1734, 1508 & 1548, U.M.W.*, 484 F.2d 78 (C.A. 6, 1973); *Re Manufacturers Trading Corp.*, 194 F.2d 948 (C.A. 6, 1952); *Hultberg v. Anderson*, 214 F. 349 (C.A. 7, 1913); *Flat Slab Patents Co. v. Turner*, 285 F. 257 (C.A. 8, 1922), cert. den. 262 U.S. 752, 67 L.Ed 1215, 43 S.Ct 700; *Clay v. Waters*, 178 F. 385 (C.A. 8, 1910); *Thomassen v. U.S.*, 835 F.2d 727 (C.A. 9, 1987); *Union of Prof. Airmen v. Alaska Aeronautical*, 625 F.2d 881 (C.A. 9, 1980); *Hyde Construction Company v. Koehring Company*, 348 F.2d 643 (C.A. 10, 1965); *Appealability of Contempt Adjudication or Conviction*, 33 A.L.R.3d 448, Sec. 23; 9 Moore's Federal Practice Sec. 110.13 [4]. Thus, until the present case, there was unanimity in all federal circuit courts with regard to the review of a civil contempt order on appeal of a judgment out of which the civil contempt proceeding arose. No basis has been presented whatsoever for a change in procedure. Accordingly, there has been a denial of procedural due process of law contrary to the provisions of the Fifth and Fourteenth Amendments of the United States Constitution. A civil contempt order is an interlocutory order, a part of the underlying civil action. *Union of Prof. Airmen v. Alaska Aeronautical*, 625 F.2d 881, 883 (C.A. 9, 1980). Accordingly, there was a proper appeal from the Contempt Order. Also, the Judgment of the District Court having been reversed and remanded, the Contempt Order should have been

held void and of no further force and effect, and the order for the warrant of arrest of John R. Marik rescinded.

6.5 THE COURT BELOW ERRED IN NOT HOLDING THAT THE CONTEMPT ORDER RESULTED IN THE IMPOSITION OF EXCESSIVE FINES AND INFLICTION OF CRUEL AND UNUSUAL PUNISHMENTS

Fines have been assessed in excess of \$290,000.00 against Petitioners and a warrant for the arrest of John R. Marik was outstanding until his arrest on December 15, 1989. Additional fines are accumulating daily, and John R. Marik's liberty remains restrained, even though the United States Ninth Circuit Court of Appeals, Case No. 88 2506, has reversed and remanded the District Court's decision. It is abundantly manifest that such fines and restriction of liberty constitute "excessive fines" imposed, and "cruel and unusual punishments inflicted" contrary to the provisions of the Eighth Amendment of the Constitution of the United States. Congress has voiced its views regarding "cruel and unusual punishments inflicted" for civil contempt jailings by passing a bill to protest against civil contempt child-custody jailings. President George Bush signed such bill on September 23, 1989. It sets a cap of 12 months on civil contempt jailings. "Bush signs bill to free jailed mom," Houston Chronicle, Sept. 24, 1989. A protest against a violation of religious liberty and freedom of speech has just as far reaching implications as does a protest against child molestation. Such was the protest of Dr. Elizabeth Morgan which prompted the passing of the aforementioned bill. Restrictions of liberty in this case exceed the twelve month cap set by such bill.

6.6 THE COURT BELOW ERRED IN NOT HOLDING THAT THERE HAD BEEN A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW

The Contempt Order issued by the District Court below, C.A. 87-0274, assesses fines based on non-compliance with issued injunction which required in part as follows:

"DEFENDANTS ARE HEREBY ORDERED: (a) to deliver up to Plaintiff for destruction all labels, signs, prints, advertising materials, literature, packages, wrappers and other materi-

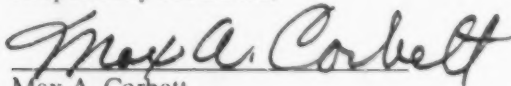
als in the possession or custody of Defendants, or any of them, or under their control, bearing the term 'SEVENTH-DAY ADVENTIST', ..."

The language of this provision is sufficiently broad to cover materials which have been properly acquired by Petitioners for valuable consideration which bears the name "Seventh-day Adventist." Inasmuch as Petitioners have such materials in their possession, to deprive them thereof without just compensation, amounts to a deprivation of property without due process of law, contrary to the provisions of the Fifth and Fourteenth Amendments of the United States Constitution. The "overbreath doctrine" applicable to statutes is equally applicable to Judgments and Injunctions. For the latest expression of the United States Supreme Court on the "overbreath doctrine," see *City of Houston v. Hill*, 482 U.S. 457, 96 L.Ed.2d 398, 107 S.Ct 2502 (1987).

7. CONCLUSION

For the reasons stated above the writ of certiorari should issue to review the decision of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,



Max A. Corbett
5902 Bermuda Dunes
Houston, Texas 77069
(713) 444 2840

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing document were duly served on each of the following specified parties on the date hereafter mentioned by depositing the same in the United States mail, postage prepaid, certified mail return receipt requested, addressed as follows:

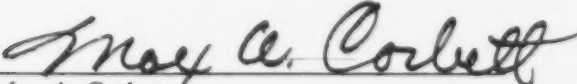
ROY A. VITOUSEK, III
LORRAINE H. AKIBA
CADES SCHUTTE FLEMING & WRIGHT
1000 Bishop Street, 12th Floor
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Attorneys for Amici Curiae

DATED: Houston, Texas, December 28, 1989.


Max A. Corbett

Attorney for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENERAL CONFERENCE
CORPORATION OF SEVENTH-DAY
ADVENTISTS,

Plaintiff-Appellee,

v.

SEVENTH-DAY ADVENTIST
CONGREGATIONAL CHURCH; JOHN R.
MARIK,

Defendants-Appellants.

No. 88-2506

D.C. No.
CV-87-0274 RES
OPINION

Appeal from the United States District Court
for the District of Hawaii
Russell E. Smith, Senior District Judge, Presiding

Argued and Submitted
May 11, 1989—San Francisco, California

Filed October 5, 1989

Before: Procter Hug, Jr., Mary M. Schroeder and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

SUMMARY

Copyright, Patent and Trademark/Courts and Procedure

Reversing and remanding the district court's judgment, the
court held that a judgment on the pleadings is improper

where a defendant either raises questions of material fact or presents affirmative defenses.

Defendants Seventh-Day Adventist Congregational Church and John Marik appealed a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. Plaintiff General Conference Corporation of Seventh-Day Adventists brought a claim against defendants under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. Marik, pro se, and allegedly on behalf of the Congregational Church, filed a response and a denial of plaintiff's allegations. Because defendants filed no response to plaintiff's motion for judgment on the pleadings, the district court ordered that it be granted. Defendants' motion to set aside the judgment was denied, and defendants appealed.

[1] A judgment on the pleadings is a decision on the merits and it is reviewed de novo. [2] Defendants filed two pleadings which the district court construed as "answers." If these "answers" are construed liberally because Marik submitted them pro se, they set forth two points that either raise questions of material fact or present affirmative defenses. [3] Defendants claimed that the name Seventh Day Adventist is generic because it refers to a religion rather than the church organization. Defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings. [4] Also in the answer, Marik made several factual assertions regarding the likelihood of confusion, and these factual allegations create a material issue of fact that should not have been determined in a judgment on the pleadings.

COUNSEL

Max A. Corbett and Peter N. Fowler, Annandale, Virginia,
for the defendants-appellants.

Lorraine H. Akiba, Honolulu, Hawaii, for the plaintiff-appellee.

OPINION

CANBY, Circuit Judge:

Defendants Seventh-Day Adventist Congregational Church and John Marik appeal a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. We reverse and remand for further proceedings.

BACKGROUND AND PROCEEDINGS BELOW

The General Conference Corporation of Seventh-Day Adventists sued the Seventh-Day Adventist Congregational Church, located in Kealahou, Hawaii, and its pastor, John R. Marik, under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. The General Conference also asserted claims under the common and statutory law of Hawaii relating to trademarks, service marks, trade names, unfair competition, deceptive trade practices, and false advertising. The complaint was filed on April 9, 1987. Marik, pro se, and allegedly on behalf of the Congregational Church, filed a response on May 18, 1987. The General Conference thought the response, which was in letter form, did not comply with the rules, and notified the defendants that it would give them an extension, until June 15, 1987, to file an amended answer. No amended answer was filed by that deadline.

On July 15, 1987, the General Conference filed a motion for judgment on the pleadings, or in the alternative, a motion to strike the answer of Marik and the Congregational Church.

12434 GEN. CONF. CORP. v. SEVENTH-DAY ADVENTISTS

A hearing on the motion was scheduled for September 8, 1987. On August 4, 1987, the defendants filed a "Denial of Plaintiff's Allegations." Pursuant to local rule, a scheduling conference was held August 10, 1987, before a magistrate. The magistrate advised Marik that the Congregational Church was an eleemosynary corporation and could not be represented pro se, and advised the Congregational Church to obtain legal counsel. The court continued the conference for that purpose.

The defendants filed no response to the motion for judgment on the pleadings. Because it received no opposition to the motion, the court ordered that judgment on the pleadings be granted, and denied the motion to strike. The judgment and a permanent injunction were entered December 8, 1987. The injunction prohibits the defendants from using a name that includes the term "Seventh Day Adventist" or "SDA," or promoting or representing to others that it is connected in any way with the General Conference. It also required the defendants to file a compliance report with the court within 30 days.

On December 28, 1987, the defendants, now represented by counsel, filed a motion for suspension of the injunction, a motion to set aside the judgment, and other related motions. On January 12, 1988, Marik and the Congregational Church filed a compliance report that stated that they refused to comply with the injunction because they believed the judgment was void for lack of subject matter jurisdiction, and because plaintiff's trademark was invalid. The General Conference responded with a motion to show cause why the defendants should not be held in contempt.

The district court denied defendants' motion to set aside the judgment, stating that the question whether "Seventh-Day Adventist" was a generic mark was one of law that had been decided in the judgment on the pleadings, and there was no reason to revisit the question upon a motion for new trial.

The defendants filed a notice of appeal on April 7, 1988. The district court then entered an order to show cause why defendants should not be held in contempt, and set a hearing for May 9, 1988. The district court held both Marik and the Congregational Church in contempt, set a fine of \$500 per day until compliance against both defendants, individually and collectively, and ordered that a warrant issue for Marik's arrest until full compliance with the injunction. The court also awarded plaintiff \$13,929.21 for attorneys' fees and costs incurred in pursuing the contempt order.

DISCUSSION

[1] A judgment on the pleadings is a decision on the merits, and we review it *de novo*. See *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c). All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party. *McGlinchy*, 845 F.2d at 810. As a result, a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings. See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 (1969).

[2] The defendants filed two pleadings that the district court construed as "Answers." If we construe these "answers" liberally because Marik had submitted them *pro se*,¹ see *United States v. Ten Thousand Dollars (\$10,000) in U.S. Currency*, 860 F.2d 1511, 1513 (9th Cir. 1988), they set forth two

¹Marik purported to answer for his church, an eleemosynary corporation. Not being an attorney, he could not answer for the church. The district court did not strike the answer, however. The church was represented by counsel by the time of its motion for new trial.

points that either raise questions of material fact, or present affirmative defenses. In the same permissive mode, the second "answer" filed after the motion for judgment on the pleadings, may be construed as an opposition to the motion. For these reasons, judgment on the pleadings was improper.

A. *Is "Seventh Day Adventist" a Generic Term?*

A trademark, even if it has become incontestable, is subject to the defense that the mark is generic. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194-95 (1985). A trademark's function is to identify and distinguish the goods or services of one seller from another. 1. J. McCarthy, *Trademarks and Unfair Competition* § 12:1 (2d ed. 1984). A generic mark is one that tells the buyer what the product is, rather than from where, or whom, it came. *Id.* A generic mark cannot be subject to trademark protection because it does not indicate the product or service's origin, but is the term for the product or service itself. *Id.*

[3] The defendants claim that the name "Seventh Day Adventist" is generic: it refers to a religion, rather than the church organization. *See Christian Science Bd. of Directors v. Evans*, 105 N.J. 297, 520 A.2d 1347 (1987). Marik discussed the generic nature of the church name in his "Answers." Construing the "Answers" liberally, we find that Marik sufficiently raised the issue as an affirmative defense when he stated:

The phrase "Seventh-day Adventist" is not theirs alone, as they would like to claim, for it describes a system or set of Bible based christian beliefs, doctrines [sic], and standards. One, therefore, is not necessarily a Seventh-day Adventist because of what organization he may be affiliated with, but rather, he is a Seventh-day Adventist because of what he believes. Seventh-day Adventism is a particular faith, and those that conscientiously hold to that

faith are Seventh-day Adventists. For an example, there are many different "Baptist" churches, but they all have a very similar faith.

Even assuming everything the General Conference alleges is true, the defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings.

B. *Likelihood of Confusion*

To establish trademark infringement, the plaintiff must prove that there is a likelihood of confusion from the defendant's use of a mark similar to plaintiff's. *See* 15 U.S.C. § 1114; *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir. 1988). Several factors are involved in determining likelihood of confusion, which is a question of fact. *See id.* at 1178-79; *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 (9th Cir. 1985) (*en banc*). These factors include: 1) the strength of the plaintiff's mark/name; 2) the proximity of the parties' goods; 3) similarity of the marks/names; 4) evidence of actual confusion; 5) marketing channels used; 6) likely degree of purchaser care; 7) defendant's intent in selecting the mark/name; and 8) likelihood of expansion of product lines. *Accuride Int'l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1533-34 (9th Cir. 1989).

[4] In the "Answers," Marik makes several factual assertions regarding the likelihood of confusion. First, he notes that the Congregational Church has "never in any way sought to deceive or confuse any one in regards to our name." He also states that the word "congregational" in the name of his church is explanatory, and distinguishes the two different churches. He states that "people have been quick to recognize this," and that the church intentionally used the word "congregational" to clarify that they were not affiliated with the plaintiff. All of these factual allegations go to the issue of likelihood of confusion, and create a question of material fact

that should not have been determined in a judgment on the pleadings.

C. Other Matters

Defendants attempt to challenge the order of the district court holding them in contempt. That order was entered, however, after the notice of appeal was filed. The order appealed from was not stayed. The notice of appeal stated that the appeal was from the judgment and injunction entered on December 8, 1987, and from the order denying new trial entered on March 16, 1988. It does not bring before us the later contempt order, and we decline to rule upon it. Further relief, if any, must come from the district court.

Because the contempt order is not before us, we deny the motion to supplement the record on appeal with the record of the contempt proceedings. We also deny, as not in compliance with Fed. R. Evid. 201, defendants' motion to take judicial notice of certain "adjudicative facts."

Remaining points urged by the defendants are without merit.

CONCLUSION

The judgment on the pleadings in favor of plaintiff is REVERSED, and the cause is REMANDED to the district court for further proceedings.

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APPENDIX B

Opinion of the United States District Court for the District of Hawaii,
in General Conference Corporation of Seventh-day Adventists v.
Seventh-day Adventist Congregational Church and John R. Marik,
C.A. 87-0274, entered on December 8, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

| | |
|-------------------------|--------------------|
| GENERAL CONFERENCE |) CIVIL NO. 87-274 |
| CORPORATION OF SEVENTH- |) |
| DAY ADVENTISTS, |) JUDGMENT AND |
| Plaintiff, |) PERMANENT |
| |) INJUNCTION |
| v. |) |
| |) |
| SEVENTH-DAY ADVENTIST |) |
| CONGREGATIONAL CHURCH, |) |
| and |) |
| JOHN R. MARIK, |) |
| Defendants. |) |
| _____ |) |

JUDGMENT AND PERMANENT INJUNCTION

Pursuant to the Order Granting Motion for Judgment on the Pleadings, and Denying Motion to Strike entered herein on September 24, 1987 and based upon the pleadings and other papers filed herein, judgment as to all matters alleged in the Complaint is hereby entered in favor of Plaintiff GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and against Defendants SEVENTH-DAY ADVENTISTS CONGREGATIONAL CHURCH and JOHN R. MARIK.

The Court hereby further orders, adjudges and decrees that

Defendants SEVENTH-DAY ADVENTISTS CONGRE-GATIONAL CHURCH and JOHN R. MARIK, and each of them, and all persons in active concert or participation with them (hereinafter collectively referred to as the "Defendants") are PER-MANENTLY ENJOINED AND RESTRAINED:

(a) from using, promoting, advertising, imitating, copying or in any way displaying any name or mark that includes the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, in connection with the offering, promotion, advertising or rendering of services or the sale or distribution of any literature or other goods, or in connection with any other activity, in a manner likely to cause confusion or to cause mistake or to deceive;

(b) from using the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENT-IST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, in any trade name or corporate name of any entity controlled by the Defendants, or by any of them, and specifically from retaining the term "SEVENTH-DAY ADVENT-IST" or "SDA" in the name of Defendants' church services, or in any offering, promotion, advertising or rendering of such services;

(c) from reproducing, counterfeiting, copying or colorably imitat-ing the mark "SEVENTH-DAY ADVENTIST" and applying such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

(d) from using any false designation of origin or false description,

or representation, or performing any act, which can, or is likely to, lead the public or any individual members thereof, to believe that the Defendants' services are in any manner associated, affiliated or connected with Plaintiff's services, or Plaintiff sponsors, approves or authorizes the Defendants' services;

(e) from representing or in any way suggesting or implying that the church services of the Defendants are in manner associated, affiliated or connected with Plaintiff's church services, or that Plaintiff sponsors, approves or authorizes Defendants' church services;

(f) from representing or in any way suggesting or implying that any of the services, literature, products or goods of Defendants are in any manner associated or connected with Plaintiff's "SEVENTH-DAY ADVENTIST" services, literature, products or goods, or that Plaintiff sponsors, approves or authorizes Defendants' services, literature, products or goods;

(g) from making any other false or misleading representation with respect to the authenticity or standard or nature of either Plaintiff's or Defendants' services or goods;

(h) from applying for or registering any service mark, trademark, trade name, certification mark or collective mark that is a reproduction, simulation, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation of Plaintiff's "SEVENTH-DAY ADVENTIST" mark with any governmental entity;

(i) from engaging in any other activity constituting an infringement of Plaintiff's service mark, trademark and tradename "SEVENTH-DAY ADVENTIST", or of Plaintiff's rights in and to such service mark, trademark and trade name;

(j) from engaging in any other activity constituting unfair competition with Plaintiff or constituting unfair or deceptive trade practices;

(k) from creating any confusion as to source, sponsorship or approval as to the Plaintiff's or the Defendants' services and goods; and

(l) from taking any actions that may injure Plaintiff's goodwill and reputation by way of imitation, misrepresentation, advertising, fraud, passing off or deception.

DEFENDANTS ARE HEREBY ORDERED:

(a) to deliver up to Plaintiff for destruction all labels, signs, prints, advertising materials, literature, packages, wrappers and other materials in the possession or custody of the Defendants, or any of them, or under their control, bearing the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and colorable imitations of "SDA"), or other designation thereof, and all plates, molds, matrices and other means of making the same; and

(b) to file with this Court and to serve on the Plaintiff within thirty (30) days after service of this Judgment and Permanent Injunction, a written report under oath setting forth in detail the manner and form in which the Defendants have complied with this injunction.

DATED: Honolulu, Hawaii, November 30, 1987.

/s/ Roger D. Foley

Judge of the Above-Entitled Court

APPENDIX C

Statutes Involved in Case

15 U.S.C. Sec. 1051

Registration; application; payment of fees; designation of resident for service of process and notice

The owner of a trademark used in commerce may register his trademark under this chapter on the principal register established:

(a) By filing in the Patent and Trademark office -

15 U.S.C. Sec. 1055

Use by related companies affecting validity and registration

Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public. If first use of a mark by a person is controlled by the registrant or applicant for registration of the mark with respect to the nature and quality of the goods or services, such first use shall inure to the benefit of the registrant or applicant, as the case may be.

15 U.S.C. Sec. 1065

Incontestability of right to use mark under certain conditions

Except on a ground for which application to cancel may be filed at any time under subsections (3) and (5) of section 1064 of this title, and except to the extent, if any, to which the use of a mark registered on the principal register infringes a valid right acquired under the law of any State or Territory by use of a mark or trade name continuing from a date prior to the date of registration under this chapter of such registered mark, the right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce, shall be incontestable: Provided, That-

(4) no incontestable right shall be acquired in a mark which is the generic name of the goods or services or a portion thereof, for which it is registered. . . .

15 U.S.C. Sec. 1115

Registration on principal register as evidence of exclusive right to use mark; defenses . . .

(b) If the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said section 1065 subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

(1) That the registration or the incontestable right to use the mark was obtained fraudulently; or . . .

(3) That the registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services in connection with which the mark is used; or . . .

(7) That the mark has been or is being used to violate the antitrust laws of the United States.

15 U.S.C. Sec. 1120

Civil liability for false or fraudulent registration

Any person who shall procure registration in the Patent and Trademark Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof.

15 U.S.C. Sec. 1121.

Jurisdiction of Federal Courts

The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

15 U.S.C. Sec. 1127

Construction and definitions; intent of chapter

In the construction of this chapter, unless the contrary is plainly apparent from the context- . . .

The term "applicant" and "registrant" embrace the legal representatives, predecessors, successors and assigns of such applicant or registrant. . . .

The term "related company" means any person who legitimately controls or is controlled by the registrant or applicant in respect to the nature and quality of the goods or services in connection with which the mark is used. . . .

The term "trademark" includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. The term "service mark" means a mark used in the sale or advertising of services to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. Titles, character names and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor. . . .

The term "registered mark" means a mark registered in the United States Patent Office under this chapter or under the Act of March 3, 1881, or the Act of February 20, 1905, or the Act of March 19, 1920. The phrase "marks registered in the Patent and Trademark Office" means registered marks. . . .

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.

28 U.S.C. Sec. 1254

Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U.S.C. Sec. 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. Sec. 1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Sec. 1338

Patents, plant variety protection, copyrights, trademarks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

Hawaii Rev. Statutes, Title 26

Sec. 480-2 Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

Sec. 481-3 Sales at less than cost

No person, partnership, firm, corporation, joint stock company, or other association engaged in business within the State shall sell, offer for sale, or advertise for sale any article, or product or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give, or advertise with the intent to give away any article or product, or service or output of a service trade, with the intent to destroy competition. . . .

Sec. 482-4 Certain prints, labels, trademarks, service mark, union labels and tradenames not to be adopted or used.

(a) It shall be unlawful for any person to adopt or use a print, label, trademark, service mark, or trade name which is identical to or confusingly similar with any registered print, label, trademark, service mark, or trade name, or the name of any partnership or corporation registered in accordance with the laws on partnerships or domestic or foreign corporations.

APPENDIX D

FEDERAL REGULATIONS AND RULES

37 Code of Federal Regulations

Sec. 2.33 Requirements of Application

(a)(I) The application shall include a request for registration and shall specify: . . .

(vii) The date of applicant's first use of the mark as a trademark on or in connection with goods specified in the application, specifying the nature of such commerce (see Sec. 2.38); (viii) The date of applicant's first use in commerce of the mark as a trademark on or in connection with goods specified in the application, specifying the nature of such commerce (see Sec. 2.38); . . .

(b) The application must also include averments to the effect that the applicant or other person making the verification or declaration in accordance with Sec. 2.20 believes himself or the firm, corporation, or association in whose behalf he makes the verification or declaration in accordance with Sec. 2.20 to be the owner of the mark sought to be registered; that the mark is in use in commerce, specifying the nature of such commerce; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use such mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods of such other person, to cause confusion, or to cause mistake, or to deceive; that the specimens or facsimiles show the mark as actually used in connection with the goods; and that the facts set forth in the application are true. . . .

Sec. 2.38 Use by predecessor or by related companies.

(a) If the first use, the date of which is required by paragraphs (a)(I)(vii) or (viii) of Sec. 2.33, was by a predecessor in title, or by a related company (sections 5 and 45 of the Act), and such use inures to the benefit of the applicant, the date of such first use may be asserted with a statement that such first use was by the predecessor in title or by the related company as the case may be.

(b) If the mark is not in fact being used by the applicant but is

being used by one or more related companies whose use inures to the benefit of the applicant under section 5 of the Act, such facts must be indicated in the application.

(c) The Office may require such details concerning the nature of the relationship and such proofs as may be necessary and appropriate for the purpose of showing that the use by related companies inures to the benefit of the applicant and does not affect the validity of the mark.

TRADEMARK MANUAL OF EXAMING PROCEDURE

Sec. 1201.02(b) Related Company, Form of Application

In a related company situation, the party who controls the nature and quality of the goods or services with which the mark is used and who is thereby the owner of the mark, should be set out in the application as applicant. The body of the application should state that applicant has adopted and is using the mark. Since applicant's adoption and use of the mark is through a related party, however, it should also be stated at this point in the application that applicant is using the mark through its related company (or equivalent explanatory wording). Use which inures to applicant's benefit is a proper and sufficient support for an application and satisfies the requirement of 37 CFR Sec. 233(a)(1)(iv) to the effect that applicant has adopted and is using the mark.

If it is not otherwise clear in the record, the Examining Attorney must specifically determine how applicant controls the nature and quality of the goods or services and how use by the related company inures to applicant's benefit.

APPENDIX E

TREATISES

American Jurisprudence

29 Am. Jur 2d Evidence

Sec. 15 Judicial, as distinguished from actual knowledge.

Judicial notice in any particular case is not determined or limited by the actual knowledge of the individual judge or court. This means that it is not essential that matters of judicial cognizance be actually known to the judge; if they are proper subjects of judicial notice, the judge may inform himself in any way which may seem best to his discretion, and act accordingly. On the other hand, facts which are not judicially cognizable must be proved, even though known to the judge or to the court as an individual. In other words, the individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record.

Sec. 16. Use of encyclopedias, textbooks, etc.

Since judicial notice is not limited by the actual knowledge of the individual judge, judges may refresh their memories upon matters properly subject to judicial notice from encyclopedias, textbooks, dictionaries, or other publications of established authenticity. However, the mere appearance of facts within such publications does not, in most jurisdictions, entitle them to judicial notice unless they are such as to be a part of common knowledge. But it is otherwise in jurisdictions which adhere to the rule that judicial notice may be taken of facts not of general common knowledge, provided they can be verified to a certainty by reference to competent authoritative sources.

Sec. 25 Matters of verifiable certainty.

It has been suggested by one authority that the trend of judicial notice is shifting from the test of common knowledge to that of

verifiable certainty. At least one jurisdiction has subscribed to the rule that a trial court in its discretion may take judicial notice of facts of verifiable certainty either upon its own motion or upon the request of a party to the action. If the fact to be noticed is not one of general common knowledge, but can be verified to a certainty by reference to competent authoritative sources, and is to be used as an adjudicative, as distinguished from a legislative fact, the trial judge or the party requesting judicial notice should notify the parties or the adversary, as the case may be, so as to afford them an opportunity of consult the same sources or of producing others. This does not mean there will be a trial of textbooks, but rather it serves only to apprise the court whether the subject is verifiable certain, or whether the issue must be proved and determined as a fact question.

Sec. History, generally.

The general rule is that matters of history, if sufficiently notorious to be subject to general knowledge, will be judicially noticed. The basis for the rule is that the facts of history enter into the construction of the laws, and so must be in the knowledge of the court the duty of which it is to construe them. Matters of public history concerning the United States or the particular state where the court has jurisdiction and affecting the whole people will always be judicially noticed. Similarly, judicial notice will be taken of the past history of territory acquired by the United States, as well as the history of acquisition. . . .

Sec. 77. Religious matters.

Matters of religious history are deemed of common knowledge and therefore of judicial notice, whether general or of a particular sect or denomination. The courts have taken judicial notice of the numerous sects into which the religious world is divided, the prevalence of a certain sect in a given locale, the general doctrines and rules of each sect, or at least of each sect within their jurisdiction, the distinction in belief between any sects or group of sects, and of the separation of two sects formerly one. The courts have taken judicial notice of the expulsion usages of particular sects, of the fact that attendance at any particular church is not limited to its members, and of the fact that many incorporated church societies have been in existence. However, judicial notice of the nature and powers of the Roman Catholic Church so far as its civil rights and duties are

concerned will not be taken without averment or proof upon the subject.

The courts have also taken judicial notice of the contents of the Bible, the form or manner of worship, and God's natural laws as demonstrated by science or admitted by man's natural experience.

American Law Reports

33 ALR3d 448 Appealability of Contempt Adjudication or Conviction

Sec. 23. Review of contempt judgment on appeal from final judgment in main cause

A number of cases support the view — either by holding or dicta — that judgments of civil contempt, though interlocutory and therefore not directly appealable, are reviewable on the appeal taken from the final judgment in the suit out of which the contempt proceedings arose. . . .

McCormick on Evidence, 3rd ed, Lawyer's ed

Chapter 26, Admissions

Sec. 269 Admissions by Conduct: (a) Adoptive Admissions

One may expressly adopt another's statement as his own. That is an explicit admission like any other, is to be classed as an express admission, and calls for no further discussion. In this text the term adoptive admission is applied to evidence of other conduct of a party which manifests circumstantially the the party's assent to the truth of a statement made by another person. . . .

Chapter 35, Judicial Notice

Sec. 330 Facts Capable of Certain Verification

The earlier and probably still the most familiar basis for judicial notice is "common knowledge," but a second and distinct principle has come to be recognized as an even more significant ground for the invocation of the doctrine. This extension of judicial notice was first disguised by a polite fiction so that when asked to notice a fact not generally known, but which obviously could easily be ascertained by consulting materials in common use, such as the day of the week on which January 1 fell ten years ago, the judges resorted to calendars but purported to be "refreshing memory" as to a matter of common knowledge. Eventually it was recognized that involved here was an

important extension of judicial notice to the new field of facts "capable of accurate and ready demonstration," "capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary," or "capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." It is under this caption, for example, that courts have taken judicial notice of the scientific principles which, while verifiable but not likely commonly known, justify the evidentiary use of radar, blood tests for intoxication and nonpaternity, handwriting and typewriter identification, and ballistics. . . .

Moore's Federal Practice

Vol. 10, Sec. 201.40 (d) When Mandatory

Taking judicial notice of "adjudicative facts" not subject to reasonable dispute is mandatory under subsection (d) when the court is requested to do so and is "supplied with the necessary information."

In making judicial notice discretionary in all other circumstances, the Advisory Committee assumed it was codifying "existing practice," and endorsing a scheme which was "simple and workable."

Naturally, the leeway available in determining whether the "necessary information" has been supplied, affords a court considerable latitude in deciding whether or not to take judicial notice.

APPENDIX F

ENCYCLOPEDIAS AND DICTIONARIES

A New English Dictionary on Historical Principles, Henry Bradley, 1914 ed.

Seventh-day

2. the seventh day of the week, Saturday; the (Jewish) Sabbath; transf. Sunday. . . .

b. In the designations of bodies of Christians who observe the seventh day of the week (Saturday) as the principal day of rest and religious observance. Seventh-day Adventists: a millenarian sect holding sabbatarian principles. . . .

New Werner Twentieth Century Edition of Encyclopedia Britannica, Vol. 25, 1905 ed., p. 52.

ADVENTISTS. The general name of Adventists is applied to a group of six more or less cognate sects of the Christian church, originating and existing chiefly in ~~the~~^{the} United States and Canada. Their founder was William Miller - from whom they have been called Millerites - who about 1831 began to preach the nearness of the second coming of Christ, and who assumed several times to fix the exact time date of the Advent, basing his calculations upon the prophecies of Daniel, the Revelation, and other books of the Bible. The first date set by him was in 1843, and when it passed without the Advent he changed it to a day in October, 1844, when he and thousands of his followers put on their "ascension robes" and awaited the end of the world. Since that time no date has been fixed, but the Adventists have continued in a state of expectancy, looking for the visible personal second coming of Christ, the resurrection of the dead, and the establishment of the millennium. There are now six major divisions of the Adventist church, as follows: I. - Evangelical Adventists. These were the original Adventists, who adopted their present name in 1845. Their creed includes belief in the resurrection

of all, eternal happiness for the saved, and eternal punishment for the lost. 2. - Seventh Day Adventists. These formed a separate body in 1845. They observe the seventh day, Saturday, as the Sabbath, and believe in the present day gift of prophecy and the annihilation of the unsaved. 3. - Church of God, or Age- to-Come Adventists. This body of Adventists was formed about 1850, upon a belief in the visible establishment of Christ's kingdom upon the earth, the restoration of Israel, and the annihilation of the wicked. 4. - Advent Christians. These became a distinctive body in 1861. They believe that immortality is conditioned upon faith in Christ. 5. - The Church of God. This body was formed in 1865 by a secession from the Seventh-day Adventists of those who disbelieved in present day prophecy. In other respects its creed is similar to that of the Seventh Day Adventists. 6. - The Life and Advent Union. This organization was formed in 1860, and believes that only the righteous are to resurrected, those who have died in their sins being forever dead.

Seventh-day Adventist Encyclopedia, 1966 ed., p. 1179, 435

SEVENTH-DAY ADVENTIST. The descriptive name adopted as a denominational title in 1860 by one branch of Adventists - those, specifically, who keep the seventh day as the Sabbath. (For the circumstances of the adoption of the denominational name, see Organization, I.) The people who first took the name in 1860 were already Adventists, not only in the broad sense of believing in the nearness of the Second Advent - for many in various parts of the world in the 1840s and earlier had believed that - but also in the restricted sense of having developed from the Millerite movement, which had called itself Adventist. By adopting the name, the Sabbathkeeping Adventists distinguished themselves from the other denominations of the Millerite movement.

Thus the popular explanation that the name was selected as denoting one who believes in the Second Advent and observes the seventh day is an oversimplification. First, there are non-Adventists who observe the seventh day - the Seventh Day Baptists. Second, the term "Adventist" does not include all who believe in the Second Advent (for example, the Apostles' Creed professes belief in the Second Advent) any more than the term Presbyterian belongs to all whose churches are governed by elders (presbyters) or the term Baptist to all who limit baptism to the immersion of believers (both

of which would apply to SDA's).

The full title "Seventh-day Adventist" (or the equivalent title in various languages) is the official name of a specific Christian denomination with a specific body of doctrines, of which the Sabbath and the Second Advent form only a part. . . .

GENERAL CONFERENCE CONSTITUTION AND BYLAWS.

The basic documents of the organization called the General Conference of SDA's. The General Conference is an unincorporated body brought into existence to administer the general affairs of the church, and especially to pursue its evangelistic aim, "to teach all nations the everlasting gospel of our Lord and Saviour Jesus Christ and the commandments of God" (Constitution, Article II).

The adoption of the first constitution in Battle Creek, Michigan, on May 21, 1863, climaxed a decade or more of lively discussions among the members regarding the advisability of church organization. Those who opposed organization, or "order," argued that it would trespass upon the believers' individual Christian liberty, and some even said that such a church organization would immediately become Babylon. Those who set forth the benefits of organization pointed out that it would prevent confusion, control fanaticism, and make provision for accrediting of the ministry, the holding of property, and the support of the work. Ellen G. White as early as 1853 urged the establishing of the church upon "gospel order." The General Conference was organized by delegates from six State conferences - Michigan, Wisconsin, Iowa, Minnesota, New York, and Ohio - meeting at Battle Creek in 1863. . . .

The Encyclopedia Americana, Vol. 24, 1972 ed., p. 620

SEVENTH-DAY ADVENTISTS, a Christian evangelistic movement that developed in the 19th Century as an outgrowth of the general advent awakening. It is rooted in the Millerite movement of the 1840's and is in part distinguished by the observance of the seventh day (Saturday) sabbath as a memorial of God's creation and by faith in the imminent, personal return of Jesus.

The essence of Seventh-day Adventists is salvation by faith in God the Son, Jesus Christ, whose life and death provide for the restoration of man to his original relationship with God. For

Adventists the Bible authentically records God's self-revelation in his saving acts by Jesus Christ, whose life and death provide for the restoration of man to his original relationship with God. For Adventists the Bible authentically records God's self-revelation in his saving acts by Jesus Christ, whose life demonstrated God's perfect will for man as enunciated in the moral law. Adventists expect the culmination of man's redemption in the return of Jesus Christ to begin his kingdom of glory. Events at the end of the present age will see the bestowal of immortality upon the redeemed, both living and resurrected, whose destiny has been determined by one phase of God's judgment. The destruction of sin and sinners follows the final phase of judgment and prepares for the creation of new heavens and a new earth, which completes the work of restoring man to God.

As authoritative voice in the Seventh-day Adventist movement from its beginning has been that of Ellen G. White, who claimed special revelations from God. She pioneered with such leaders as Hiram Edson, Joseph Bates, and her husband James White. Her counsels led to the formal organization of the Seventh-day Adventist Church in Battle Creek, Mich., in 1863, and continue to give direction in the development of the church. She wrote some 45 books and thousands of articles in such fields as education, health, and Christ-directed living.

Teaching redemption of the whole man, Adventists proscribe the use of "unclean" foods, alcoholic beverages, and tobacco, and the nonmedical use of drugs. They advocate a vegetarian diet and a balanced program of exercise and hygienic living. They carry on work in 185 countries and territories, operating over 325 medical units and supporting 450 colleges and secondary schools and nearly 4,000 elementary schools.

Adventist churches are organized along congregational lines within state conferences, union conferences, and world divisions of a general conference, with headquarters in Washington, D.C. Adventist membership exceeds 2 million.

ROBERT H. PIERSON, President

General Conference of Seventh-day Adventist

The Encyclopedia of American Religions, 2nd ed., 1987, J. Gordon Melton,

Chapter Eleven

THE ADVENTIST FAMILY, p. 77

Since the beginning of Christianity, various groups have arisen sporadically to preach a type of faith that has been called apocalyptic, chiliastic, or millennial. The movements have been characterized by the expectation of the immediate return of Christ to bring a final end to "this evil order" and replace it with a new world of supreme happiness and goodness. At every turning point in the history of Christianity, people supporting such movements appeared, sometimes within the mainstream of church activities as disturbers of accepted patterns of life, and sometimes at the outer edge of church activities as critics and reformers. Always their presence is felt because they promote an idea which orthodox Christians have said to be part of the faith. . . .

MILLENNIALISM IN AMERICA. (p. 79-81). The American millennial movement which today is known as Adventism had its beginning in New York, started there by William Miller, a Baptist layman. Miller had settled in New York after the War of 1812. For awhile Miller was a Deist, denying that God interferes with the laws of the universe, and stressing morality and reason rather than religious belief. Then Miller began to study the Bible. This study, which lasted about two years, seemed to satisfy his major doubts, but also convinced him that he was living near the end of his age. Further study over several years convinced him not only that the end was near, but also that he had to go and tell the world about it. His first labors were at Dresden, New York, where a revival followed his speaking in 1831. . . .

Miller's movement was taking on a more definite shape in this period. Before the end in 1843, the first camp meeting was held at East Kingston, New Hampshire. In November, the second periodical, *The Midnight Cry*, was begun. Miller was also sharpening his views. Until 1843, Miller had been vague about the second coming as being "about the year 1843." But on January 1st, he committed himself to a more definite stance: "I am fully convinced that somewhere between March 21st, 1843 and March 21st, 1844, according to the Jewish mode of computation of time, Christ will

come." . . . March 14, 1843, came and went. . . . In August, Samuel S. Snow put forth the "seventh month" scheme which looked to October 22, 1844, as the real date of return. Tension reached a new high. On October 22, the Adventists gathered to await the Lord. However, as one author put, "But the day came. And Christ did not." . . . Ethical positions among Adventists have shown two seemingly divergent trends. An emphasis on the Old Testament and on the law as mandatory for Christians has developed out of the acceptance of the Sabbath. Some groups have gone so far as to celebrate Jewish holidays and dietary laws. The celebration of the Sabbath has been promoted by the ecumenical Bible Sabbath Association, which was formed as a counterpart of the Lord's Day Alliance of the United States. . . .

Adventist Family (p. 431-435)

Sunday Adventists (p. 431) . . .

Seventh-Day Adventists (p. 432)

BRANCH SDA'S

Box 4666

Waco, TX 76705

DAVIDIAN SEVENTH-DAY ADVENTISTS
ASSOCIATION (p. 432)

Pashan Hill

Exeter, MO 65647 . . .

GENERAL ASSOCIATION OF DAVIDIAN
SEVENTH-DAY ADVENTIST (p. 433)

Rte. 1, Box 174

Salem, SC 29676 . . .

SEVENTH-DAY ADVENTIST CHURCH,
REFORM MOVEMENT (p. 434)

American Union

6380 63rd St.

Sacramento, CA 95824

SEVENTH-DAY ADVENTIST CHURCH
6840 Eastern Ave., N.W. (p. 435)

Washington, D.C. 20012

The Westminster Dictionary of Church History, Jerald C. Brauer, 1971 ed., p. 763, 764.

Seventh-day Adventists

A religious denomination that grew out of the ministry of William Miller. This group is a conservative legalistic, premillennial body which emphasizes the observance of Saturday as the Sabbath and acknowledges the inspiration of Ellen G. White. William Miller and Mrs. White were 19th-century Americans who believed that Christ would return in 1844. The Adventists began by rationalizing the Biblical passages which they felt had been fulfilled then. However, they were not formally organized until 1863. They now believe that the only prophetic texts waiting to be fulfilled concern their church and its ministry. When the Adventist message has been proclaimed throughout the world and their church has been built to its predestined size, then the end of the age will come. Besides their prophetic interests, the Adventists believe in soul sleep until the resurrection of the dead, when the faithful will be rewarded while the wicked will be destroyed. Adventists practice baptism by total immersion and have a congregational church polity tempered by local and national conferences. The group has a heavy commitment to missions, printing, and education. There are approximately 3,326 Seventh-day Adventist Churches with 370,688 members in the United States, and the worldwide membership is believed to be approximately twice this figure.

Universal Dictionary of the English Language, Robert Hunter and Charles Morris, 1897 ed.

Adventist A believer in the second advent or coming of Christ. Adventists are divided into Advent (or Second Advent) Christians, Seventh-day Adventists (of whom there are 34,000 in these States) and Evangelical Adventists.

Webster's New International Dictionary, Third Ed., 1958, p. 38

Adventism a. A believer in the doctrine that the second coming of Christ and the end of the world (or age) are near at hand. b. Specif., this doctrine as preached by William Miller from 1831 on, and by his followers.

Adventist A believer in the doctrine of Adventism; a member of

a religious body emphasizing this doctrine; - called also Second Adventist.

TABLE OF ADVENTIST BODIES IN THE UNITED STATES

| Name | History | Doctrines, Etc. |
|------------------------------------|---------|-----------------|
| Evangelical Adventists | ... | ... |
| Advent Christian Church | ... | ... |
| Seventh-day Adventist Denomination | * | ** |
| Church of God (Adventist) | ... | ... |
| Life and Advent Union | ... | ... |
| Churches of God in Christ Jesus | ... | ... |

* Some followers of Wm. Miller began in 1844 and 1845 to observe the seventh day; organized with present name at Battle Creek, Mich, in 1860.

** Observance of the seventh day; immortality received only through faith in Christ; after the Second Advent and millennium, annihilation of Satan and the wicked.

The American Heritage Dictionary, William Morris, 1981 ed.

Seventh-Day Adventist. A member of a sect of Adventism distinguished chiefly for its observance of the Sabbath on Saturday.

The World Book Encyclopedia, Vol. 17, 1989 ed., p. 326

Seventh-day Adventists, are a Christian religious denomination. Members of this denomination believe that Christ will return in person. They also observe the Sabbath on Saturday, the seventh day of the week.

Adventists originated in the early 1800's, when many people in America and Europe became absorbed in the doctrine of Christ's second coming. References in the Bible that seemed to prophesy the time of Christ's coming aroused their interest. Followers of William Miller, a Baptist minister, predicted a definite time for the coming, but Miller's interpretation proved wrong. One group restudied Bible

prophecies. It decided that what had happened was the beginning of the judgment in heaven that is to precede the second coming of Christ. This group organized in 1863 as the Seventh-day Adventists.

The denomination has about 4 1/2 million members throughout the world, including more than 675,000 in the United States and Canada. The headquarters of the denomination are located at 6840 Eastern Ave. N.W., Washington, DC 20012.

APPENDIX G

HISTORIES AND BIBLE

A History of Churches in the United States and Canada, Robert T. Handy, 1977 ed.

p. 194-196

Another development in the 1830s and 1840s added to the difficulties of the evangelicals. Though the millennium was often referred to in sermons and writings, Protestant leaders did not normally undertake to set the date of its coming. But that was done by William Miller (1782-1849), former Deist who had been received as a convert in the Baptist church at Low Hampton, New York, in 1816. Troubled by the charge that the Bible was inconsistent, he found the solution of the difficulties in the millennial prophecies, especially of the books of Daniel and Revelation. When he announced his conclusion that Christ would return to earth in 1843, he soon became famous and engaged in considerable travel, illustrating his predictions with a huge chart. Many thousands from various denominations flocked to his meetings.

Several specific dates for the return of the Lord were set and passed - finally all was staked on 22 October 1844. Disillusionment followed - some returned to their churches, others lost interest in religion, while a few remained faithful to the Adventist or millenarian cause, believing that somehow a chronological error had been made. An Adventist general conference was held in Albany in 1845, but the movement, torn by controversy, proliferated into a number of bodies, such as the Advent Christian Church and the Church of God (Adventist). One stream of the movement adopted the Seventh-day (Saturday) observance of the Sabbath and eventually became the Seventh-day Adventist Church. A biblicistic, revivalist spirit marked these continuing Adventist bodies as a new denominational family was added to the widening spectrum of American religion. . . . The percentage of church members in proportion to the population had been steadily increasing throughout the period, as denominations

in which revivalism was strong surpassed the others in size.

p. 294

Agreeing on many points with the larger evangelical denominations but self-consciously separated from them by certain distinctive emphases were a number of smaller bodies, most of them very conservative theologically. The Adventist churches that had stemmed from the Millerite excitement and disappointment of the 1840s continued to multiply in the post-Civil War period. The Seventh-day Adventists had a remarkable leader in the prophetess Ellen Harmon White (1827-1915), whose spiritual visions and concerns about matters of diet and health set their mark on a steadily growing church. In the twentieth century, Seventh-day Adventist mission, stewardship, and publication efforts were impressive for so relatively small a denomination.

p. 374

In the years following Confederation, a number of the new religious movements of Great Britain and the United States found their way into Canada. Among them were those with varying Adventist and millenarian views, such as Seventh-day Adventists, Jehovah's Witnesses, and Plymouth Brethren.

Bible

Exodus 20:8-11 NKJ

Remember the Sabbath day, to keep it holy. Six days you shall labor and do all your work, but the seventh day is the Sabbath of the Lord your God. In it you shall do no work: you, nor your son, nor your daughter, nor your manservant, nor your maidservant, nor your cattle, nor your stranger who is within your gates. For in six days the Lord made the heavens and the earth, the sea, and all that is in them, and rested the seventh day. Therefore the Lord blessed the Sabbath day and hallowed it.

James 2:10 NIV

For whosoever keeps the whole law and yet stumbles at just one point is guilty of breaking all of it.

John 14:3 NKJ

"And if I go and prepare a place for you, I will come again and receive you to Myself; that where I am, there you may be also.

Revelation 14:9-12 NKJ

Then a third angel followed them, saying with a loud voice, "If anyone worships the beast and his image, and receives his mark on his forehead or on his hand, he himself shall also drink of the wine of the wrath of God, which is poured out full strength into the cup of His indignation. And he shall be tormented with fire and brimstone in the presence of the holy angels and in the presence of the Lamb. And the smoke of their torment ascends forever and ever, and they have no rest day or night, who worship the beast and his image, and whoever receives the mark of his name." Here is the patience of the saints; here are those who keep the commandments of God and the faith of Jesus.

Revelation 16:1,2 NKJ

Then I heard a loud voice from the temple saying to the seven angels, "Go and pour out the bowls of wrath of God on the earth." So the first went and poured out his bowl upon the earth, and a foul and loathsome sore came upon the men who had the mark of the beast and those who worshiped his image.

APPENDIX H

DENOMINATIONAL BOOKS

Early Writings, E.G. White, Prologue, p. xx

As we trace the story of the beginning of Sabbath-keeping among the early Adventists, we go to a little church in the township of Washington in the heart of New Hampshire, the State that adjoins Maine on the east and whose western boundary is within sixty miles of the New York State line. Here the members of an independent Christian church in 1843 heard and accepted the preaching of the Advent message. It was an earnest group. Into their midst came a Seventh Day Baptist, Rachel Oakes, who distributed tracts setting forth the binding claims of the fourth commandment. Some in 1844 saw and accepted this Bible truth. One their number, William Farnsworth, in a Sunday morning service, stood to his feet and declared that he intended to keep God's Sabbath of the fourth commandment. A dozen others joined him, taking their stand firmly on all of God's commandments. They were the first Seventh-day Adventists.

Seventh-day Adventist Church Manual, 1986, p. 37,38

FORMS OF CHURCH GOVERNMENT

There are four generally recognized forms of church government. These may be summarized as follows:

1. Episcopal -
2. Papal -
3. Independent - the form of church polity that makes the local church congregation supreme and final within its own domain. This is usually referred to as congregationalism.
4. Representative - the form of church government which recognizes that authority in the church rests in the church membership, with executive responsibility delegated to representative bodies and officers for the governing of the church. This form of church government recognizes also the equality of the ordination of the

entire ministry. The representative form of church government is that which prevails in the Seventh-day Adventist Church.

Seventh-day Adventist Yearbook 1988

p. 241

HAWAII CONFERENCE

Established 1895; organized 1918 Territory: Hawaii and Johnston Island Population: 1,062,300; churches, 21; members 4,451.

p. 495

HEALTH-CARE INSTITUTIONS - HOSPITALS AND SANITARIUMS

CASTLE MEDICAL CENTER

640 Ulukahiki Street

Kailua, Hawaii 96734

Established 1961; opened 1963

Seventh-day Adventism Renounced, D.M. Canright, 1889 ed.

p. 25

Seventh-day Adventism originated about fifty years ago in the work of Mr. Miller, who set the time for the end of the world in 1843-4. Adding some doctrines to the original faith, Elder James White and wife in 1846 became the leaders of the Seventh-Day branch of Adventism. Their headquarters were at different times at Paris, Me., Saratoga, Oswego, and Rochester, N.Y. In 1855 they settled permanently at Battle Creek, Mich., which has remained the center of the work ever since.

p. 20,21

Seventh-Day Adventist believe and teach that before the second coming of Christ the United States will form a union of church and state, and, like France and Spain in the seventeenth century, will become a persecuting power. They hold that the prophetic Scriptures clearly foretell this extraordinary change in the form and spirit of our government. Touching the correctness of the interpretations of Scripture upon which their expectations are based, they admit no

possibility of mistake. They assume to know that they have the right key to prophecy - that they have the "present truth." They believe and teach that the Seventh-Day Adventists are to be especially tried in this ordeal that is being prepared by the civil government; that they are to be the chief victims of the fiery persecutions that will be waged against the "Saints of the Most High;" that they are to suffer, at the hands of the secular power, imprisonments, tortures, "the spoiling of their goods," and perhaps death itself. Indeed, they stake their whole system of doctrine upon this meaning of the Word of God, and they regard these momentous events, which they claim the Bible forecasts, as much a reality as though these events had already transpired. Those events are a reality to them and have the same value in argument, and the same authority in action, as history itself. In their publications and sermons they often adopt the style of the confessor who is already brought to the scaffold, or bound to the stake; they speak out in a tone of defiant, heroic submission, as though the fagots were being kindled and the crown of martyrdom were in full view.

APPENDIX I

GENERAL CONFERENCE OF SEVENTH-DAY ADEVENTISTS TRADEMARK - NEW POLICY

On or about November 1, 1988, the North American Division of Seventh-day Adventists meeting in Minneapolis, Minnesota, adopted a new policy, NAD B 80, General Conference of Seventh-day Adventists Trademark, which reads as follows:

B 80 GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS TRADEMARK

B 80 05 Statement of Philosophy — The Seventh-day Adventist Church has a historical, evangelical, and proprietary interest in trademarks, service marks, and trade names (referred to collectively herein as “trademarks”) developed by the Church and its related organizations. This policy shall apply to the General Conference of Seventh-day Adventists, the world divisions and departments of the General Conference of Seventh-day Adventists, and other services, organizations, and corporations listed as General Conference entities in the current Seventh-day Adventist Yearbook (referred to collectively herein as “General Conference”). This policy shall also apply to other Seventh-day Adventist entities or organizations utilizing trademarks owned or controlled by the General Conference. It shall be the policy of the General Conference to obtain maximum legal protection under applicable law in harmony with the following procedures and guidelines:

B 80 10 Ownership — All legal rights in any trademark utilized by the General Conference, as defined, shall be vested in the General Conference Corporation with use by a related or subsidiary entity subject at all times to approval and review by the General Conference Corporation.

B 80 15 Registration and Fees — Trademark registration shall be

obtained through the General Conference Trademark Committee pursuant to an enabling action of the General Conference Corporation. Legal fees and other expenses incidental to maximizing trademark protection shall be paid in full by any department, subsidiary, or related organization of the General Conference initiating the process or utilizing the trademark with the understanding that ownership at all times shall be vested in the General Conference Corporation.

B 80 20 Unauthorized Use — It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that should be taken to protect the proprietary interests of the Church as well as its good name. Approval by the General Conference Officers shall be obtained prior to the implementation of any legal action.

B 80 25 Other Trademarks — Seventh-day Adventist entities other than the General Conference shall be entitled to maintain trademark ownership and registration for various marks in their own names so long as such application, ownership, and use does not conflict with existing trademarks, legal rights and/or policy of the General Conference. The General Conference Trademark Committee shall provide assistance and direction to non-General Conference entities as necessary.

B 80 30 Limitation of Rights — Nothing in this policy shall be construed or interpreted as limiting any of the legal rights of the General Conference Corporation with respect to its ownership and use of any and all of its trademarks.

B 80 35 Use of Existing Marks — The use of any existing trademarks including, but not limited to, "Seventh-day Adventists," and/or "Adventist" or any derivative of such trademarks, including, but not limited to "SDA," are authorized as follows:

1. Church entities that have denominational status and are included in the current Seventh-day Adventist Yearbook shall have license to use these trademarks in their names and ministries unless

specifically revoked by the General Conference Corporation. Such trademarks shall not be utilized in commercial endeavors.

2. Local churches and companies may use these trademarks in their names and ministries following approval of status by the local conference or mission. Such trademarks shall not be utilized in commercial endeavors.

3. Lay and professional groups may not utilize trademarks owned by the General Conference Corporation without its express written approval. Application for such use shall be made to the secretary of the Seventh-day Adventist Trademark Committee of the General Conference. Use of such trademarks by lay and professional groups must be solely for noncommercial purposes. Granting such license to use trademarks owned by the General Conference Corporation shall be at the sole discretion of the General Conference based on the following conditions:

a. Recommendation by the local conference or mission that the lay or professional group requesting trademark usage be granted the license;

b. The activities of the lay or professional group shall be in harmony with the teachings and specifically supported by the Seventh-day Adventist Church;

c. The organization's board and membership shall consist of Seventh-day Adventists in good and regular standing;

d. The anticipated use of the trademark shall not be in conflict with previously granted license(s); and

e. The trademark shall be utilized solely in noncommercial functions.

B 80 40 Right to Revoke — The General Conference Corporation shall maintain the right to revoke permission for the use of any trademarks by any denominational entity or lay group at any time, with or without cause.

APPENDIX I

NEWSPAPER ITEMS

Houston Chronicle, Sunday, September 24, 1989, p. 21A

Bush signs bill to free jailed mom

WASHINGTON (AP) - President Bush signed a bill Saturday designed to free a Washington mother jailed 25 months ago in a bitter child custody dispute, and attorneys filed an emergency motion for her release.

Presidential spokesman Marlin Fitzwater said Bush signed the bill to free Dr. Elizabeth Morgan "out of compassion for her plight."

The bill was approved by Congress amid growing national attention for the case. It applies retroactively to Morgan, who was jailed for failing to produce her 7-year-old daughter, Hilary, for court-ordered visits with the girl's father Dr. Eric Foretich.

Morgan, a prominent plastic surgeon, hid her daughter and went to jail after alleging that Foretich had sexually abused the girl. Foretich has repeatedly denied those charges and at one point offered a \$5,000 reward for information that would help find the girl.

The child's whereabouts, however, remains secret. . . .

The bill takes advantage of Congress' authority to review district laws and, among other things, sets a 12-month cap for civil contempt child-custody jailings. It also contains a so-called sunset provision that means it automatically goes off the books in 18 months.

As clamor over the case grew, the House and Senate accelerated action on the bill. A late-working Senate approved the measure Friday morning, shortly after midnight, and sent it to the president's desk. . . .

As the bill raced to the president, the entire appeals court was reviewing an August decision by a three judge panel that Morgan should go free.

In that earlier decision, the judges ruled that Morgan should be released because the coercive basis for her jailing had become unconstitutionally punitive.

